IN THE

Supreme Court of the United States

WM. M. FARRINGTON, Plt'ff in Error,
vs.
THE STATE OF TENNESSEE ET AL. } No. 982.

S. H. DUNSCOMB, Plaintiff in Error,
vs.
THE STATE OF TENNESSEE ET AL. } No. 983.

M. J. WICKS, Plaintiff in Error,
vs.
THE STATE OF TENNESSEE ET AL. } No. 984.

J. C. NEELY, Plaintiff in Error,
vs.
THE STATE OF TENNESSEE ET AL. } No. 985.

ARGUMENT AND BRIEF

—OF—

ESTES, JACKSON & ELLETT,

OF COUNSEL FOR PLAINTIFFS IN ERROR.

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THE STATE OF TENNESSEE ET AL.

Estes, Jackson and Ellett, of counsel for plaintiffs in error in the above stated causes submit:

I.

THE STATEMENT.

These cases are here on writ of error to the Supreme Court of Tennessee. They each involve the same questions, and are presented together. The plaintiffs in error were stockholders, respectively, in "The Union and Planters Bank," "The Hernando Insurance Company," "The Savings Bank

of Memphis," and "The Bluff City Insurance Company;" each corporation having its business situs in Memphis, Tennessee. The defendants in error claiming that these stocks were subject to taxation under existing laws, caused them to be assessed and taxed for 1872. The stockholders resist the taxation on the ground that by *reason of the contract with the State, contained in the charters of the several corporations*, these stocks are exempt from the tax sought to be imposed. The Supreme Court adjudged the stock to be subject to taxation, two of the five Judges dissenting. To reverse this judgment, the writs of error are prosecuted.

The exemption clause is substantially the same in each charter. That of the Union and Planters Bank and that of the Bluff City Insurance Co., is as follows: "That said com-"pany shall pay to the State *an annual tax* of one-half of one "per cent. on *each share* of the capital stock subscribed, *which* "*shall be in lieu of all other taxes.*"

The 3rd section of the Charter of The Savings Bank of Memphis, and the 10th section of the Charter of the Hernando Insurance Co., are identical, and provide as follows: "That said institution shall pay to the State one-half of one "per cent. *on each share* of the capital stock, *which shall be in lieu of all other taxes.*"

an annual tax of

The Legislature of Tennessee, by its Revenue Act of 1869–70, chapter 81, section 1, provides "That all shares of stock in any bank, corporation or company, *now* or hereafter incorporated by or in pursuance of any law of this State or any other State, and all public bonds or stocks, except United States bonds, which by the laws of the United States are expressly exempt from taxation, shall be valued and assessed, and subject to taxation."

Under this law these stocks were assessed for State and County taxes for 1872. The stockholders insist that this Act imposing this taxation on these stocks, impairs the obligation of the charter contract, and violates section 10, of Article I, of the Constitution of the United States.

II.

ERRORS ASSIGNED.

The several plaintiffs in error in these causes, by their attorneys, say that in the Record and proceeding aforesaid there is manifest error in this, to-wit:

1st. The Supreme Court of Tennessee erred in adjudging and deciding by its final decree and judgment in each of these cases, as follows: "That the claim made by the defendants, (here plaintiffs in error), that the Revenue Act of the Tennessee Legislature of 1869–70, ch. 1, sec. 1, providing that "all shares of stock in any bank, corporation or company, now, or hereafter incorporated by or in pursuance to any law of this State or any other State, and all public bonds or stocks, except United States bonds, which by the laws of the United States are expressly exempt from taxation, shall be valued and assessed, and subject to taxation," under and by virtue of which Act the defendants' (naming the plaintiffs in error in each case respectively,) shares of stock in the corporation (naming the respective corporation in each case) was assessed for State and county taxes, impaired the obligation of the contract of exemption from taxation contained in the Charter of the said corporation, (naming the respective corporations) and violated sec. 10 of Art. I, of the Constitution of the United States, this Court doth adjudge and decide this point and claim against the defendants, on the ground that the shares of stock in said bank, are not the property or thing exempted by the Charter, but other and different, and so not within the protection of the said Charter and of said section of the Constitution of the United States."

2nd. The said Court erred in adjudging that said stocks were subject to the taxes in question, and in decreeing that said taxes "were properly assessed by the State of Tennessee and the County of Shelby as State and county taxes for the year 1872, upon the shares of stock mentioned," and in pronouncing judgment in favor of said State and county, respectively,

for the taxes assessed against the plaintiffs in error and their sureties.

And the said several plaintiffs pray that the judgments aforesaid may be reversed, annulled and altogether held for naught, and that they may severally be restored to all things which they have severally lost by occasion of said several judgments.

III.

ARGUMENT AND BRIEF.

If by the clauses of the several Charters, the State has precluded itself from taxing the shares of stock in these corporations otherwise than as therein expressed, it is well settled that the *agencies* of the State, counties and municipal corporations are equally estopped from doing so. See

Union Bank vs. The State, 9 Yerg., 490;
City of Nashville vs. Thomas, 6 Caldwell, 602;
City of Memphis vs. Jackson Ins. Co., (MS. opinion of Supreme Court of Tennessee delivered at Jackson in 1872.)

In this last cited case C. J. Nicholson, delivering the opinion of the Court, says: "But it is clear that municipal corporations are not authorized to levy taxation on property or privileges, other than such as are taxable by the statutory laws of the State. The municipal corporation is an agency of the State Government, &c. It follows that if the State has estopped itself from imposing other taxes, the municipal corporation is equally estopped. This question was decided by this Court in the case of the Union Bank vs. The State, 9 Yerg. 490." Has the State then estopped itself by the above charter stipulations for exemptions, from imposing any taxes upon the shares of stock held by the stockholders in these corporations? No right of amendment or repeal being reserved to the State of Tennessee, either in its Constitution or in these Charters, it follows that whatever stipulations the

acts of incorporation contain regarding taxation or immunity from taxation, are irrepealable by the State—being *contracts* protected by section 10 of Article I, of the Constitution of the United States.

Cooley on Taxation, p. 55–6, and cases cited;
15 Wallace, 454;
18 Wallace, ~~X~~ 224—225
3 Sneed Tenn. Repor

Nor can any question be raised as to the po
lature to make these charter contracts. The Constitution of Tennessee in force when these acts of incorporation were passed, and accepted by the corporations, contained *no restriction or prohibition* on the power of the Legislature to grant Charters, with the provision for exemption from taxation as set forth in the above clauses. In the absence of such constitutional *restriction or inhibition*, the legislative authority to make such contracts for exemption as are contained in the present Charter, is not *now* an open question in this Court.

Constitutional

Cooley on ~~Contract~~ Limitations, pp. 127, 279, 280, 515;
22 Wallace, 226;
16 Wallace, 244;
8 Wallace, 438;
13 Wallace, 264, 269;
16 Howard, 386, 416;
1 Black, 436.

9 Wall

The Supreme Court of Tennessee in deciding the question presented in these agreed cases, against the plaintiffs in error, have accordingly taken no *shelter* under any constitutional objection to the validity or legality of these charter contracts. They concede the power and authority of the Legislature to make them, and rest their decision exclusively upon the *construction* of the exemption clauses.

The single question then involved in these cases, while extremely important to the parties concerned, yet lies within a very narrow compass, being confined to a mere inquiry into the true *meaning and construction* of a single section in these

for the taxes assessed against the plaintiffs in error and their sureties.

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The single question then involved in these cases, while extremely important to the parties concerned, yet lies within a very narrow compass, being confined to a mere inquiry into the true *meaning and construction* of a single section in these

several Charters or Acts of Incorporation, or as Mr. J. Freeman, delivering the majority opinion of the Supreme Court of Tennessee, states the proposition, "The simple question presented in these cases is, whether the clauses of the Charter exempt the shares of stock owned by the stockholders from taxation as property in their hands, * * * * * what then is the legal effect and extent of the clauses in the Charter before us, in reference to the liability of the shares of stock to be taxed by the State."

It is well settled that this Court is not bound by the *construction* which the Supreme Court of Tennessee has placed upon these *charter contracts* between the State and the several companies or corporations; and that this Court will for itself construe and interpret these *contracts* for exemption, independently of the State *adjudication* on the question.

18 Howard, 331, 380;
16 Howard, 190, 369, 432;
1 Black, 436;
15 Wallace, 460.

Has the Supreme Court of Tennessee, in deciding that the above stipulation for exemption from taxation, was not *intended* to embrace, and *does not* extend to the shares of stock held by the stockholders in these corporations, given to the *contracts* their true meaning and construction? We confidently submit that they have not, that both upon principle and authority, the stockholders, in respect to their shares of stock, are embraced within the exemption from taxation.

The Federal and State Courts have been frequently called upon to construe similar exemption clauses in Acts of Incorporation, and they have, almost without exception, held that the shares of stock owned by the corporation or stockholders, were included in and entitled to the benefit of the exemption. In several instances, the stipulation for immunity from taxation was far less clear and explicit than in the present Charters.

A brief reference to these decisions will show conclusively, that as a question of authority, the Supreme Court of Tennessee has not given the true *construction* to these exemption *clauses*. In Gordon vs. Appeal Tax Court, 3 Howard, p. 133, the identical question now submitted was presented and determined by this Court. The correctness of the *construction* which this Court placed upon the exemption clause in that case, has been repeatedly recognized and followed. In commenting on that case, and the question *here involved*, Mr. Redfield says:—1 Redfield Am. Railway Cases, 2d ed., top pages 505, 506: "And there is no case or class of cases of any "authority, wherein the shares and the capital stock or prop- "erty of the corporation are held to be identical or substan- "tially so, *except*, in regard to *exemptions* of corporations from "taxation. It is now well settled, after a good deal of debate "and some conflict of decision, that an exemption from tax- "ation of a corporation, which is contemporaneous with its "Charter, whether it is procured by the payment of a *bonus* "or is merely *gratuitous* on the part of the State, if it form one "of the conditions of the grant, thereby becomes perpetually "binding upon the State, and irrepealable. In this case, (3 "Howard,) the Bank paid a *bonus* to obtain its Charter, and "the Charter contained a stipulation 'not to impose any fur- "ther tax or burden upon them during the continuance of "their Charter.' This was held to *exempt the stockholders* from "all taxation on account of their shares in the capital stock. "This was *a very just and proper construction of such an exemp- "tion* from taxation. For although in strictness, it was giv- "ing the exemption an extension beyond the fair import of "the words, it no doubt met the *purpose and intent* of "the parties to the contract more fully than any other. And "as it is not common to tax the corporation for its property "or franchise, and at the same time tax the stockholders; if "such an exemption from taxation was not held to extend to "*both*, it would prove of no practical avail to the grantors, "since all the tax which is ordinarily levied upon both, might "still be levied upon the shareholders, and thus the exemp- "tion be rendered futile. *Hence the cases have finally adopted*

"*this view.*" (Citing the cases.) See to the same effect, 2 Redfield on the Law of Railways, 5th ed., pp. 428 and 429, section 229, where this subject is discussed, and the authorities specially referred to.

The purpose and intent of the parties to exempt the stockholders in the Charters now under consideration, are much more strongly indicated and expressed than in the 3 Howard case. These companies are to pay the State an annual tax of one-half of one per centum on *each share* of the capital stock (subscribed) "*which shall be in lieu of all other taxes.*" These "*shares*" of the capital stock subscribed on which the commutation tax is to be paid, refer more clearly and appropriately to the property of the stockholders in the corporation, than anything contained in the exemption clause in Gordon's case—for "*shares*" are the proper designation of the *stockholders* interest in the corporation.

In Lionberger vs. Rouse, 9 Wallace, 468, the question was whether the shares of stockholders in certain National Banks in Missouri were liable to taxation. Exemption was claimed on the ground that the *stockholders* in two of the State Banks were not taxed. But this Court held that as this *exemption* of the stockholders in the State Banks was *not voluntary* on the part of the State, but arose by reason of their *contract* with the State, the stockholders in the National Bank could not, under the act of Congress, rightfully claim to be placed upon the same footing with such stockholders in the old State Banks. These State Banks were incorporated under an act of 1857, and their Charter contained this provision, viz: "*Each Banking Company agrees to pay to the State annually one per cent. on the amount of the capital stock paid in by the stockholders* other than the State, *which shall be in full of all levies and taxes to be paid to the State by the respective banks.*"

In construing this exemption clause, Mr. Justice Davis delivering the opinion of this Court, says: "There is no way the State could compel them (the two old banks which continued business under their State Charter of 1857) to relinquish their Charter; *nor has it the power to tax their*

stockholders on their shares of stock. Having contracted with these banks to accept from them annually in lieu of all taxes one per cent. on their paid in capital stock, it (the State) *cannot turn round and assess a tax on the shareholders.* As the State did all it could to conform its legislation to the requirements of the law, it was therefore in a condition to impose the tax in question held by plaintiff in error." This decision is directly in point here, for Lionberger's right to the exemption he claimed, necessarily involved the determination of the question, whether the State had the power to tax the *shares of the stockholders in the two State Banks.* If the State of Missouri could have *lawfully* taxed the stockholders on their shares in the two State Banks, then it will necessarily follow that its failure to impose such taxation would operate as an estoppel upon the State against taxing Lionberger's shares of stock in the National Bank, for by the 41st section of the National Bank act, it is provided, "that the tax so imposed under the laws of any State, upon the *shares* of any of the associations authorized by this act, *shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located.*"

Hence, the decision in that case necessarily involved the question whether the State had debarred itself from taxing the shareholders on their stock in the two State Banks by the exemption clauses already quoted.

It will be observed that the stipulation for exemption from taxation in the Charters of these Missouri banks, is no *clearer* or more *explicit* in favor of the stockholders than the exemption clauses under the Charter now before the Court.

The following are also pointed authorities sustaining the position assumed by the plaintiffs in error in these cases:

Johnson vs. Commonwealth, 7 Dana, 342.
The State vs. Branier, Collector, 3 Zabriskie, 484.
State, Vail, Prosecutor, vs. Bently, 3 Zabriskie, 533.
Bank of Cape Fear vs. Edwards, 5 Iredell, 516.
The Delaware Railroad Tax, 18 Wall., 224, 229.
Wilmington Railroad vs. Reid, 13 Wall., 264.
Morgan vs. Louisiana, 93 U. S., 217.

Iron City Bank vs the City of Pittsburg
37 Penn. State Rep. p. 347

Tested by these authorities, it is clear that the Supreme Court of Tennessee has not placed the right construction upon the exemption clauses under the present Charter. These Charters were proffered by the State from considerations ot public policy, and the payment of the bonus or commutation tax, stipulated and agreed to be *annually* paid by the corporations *on each share of the capital stock.*

The corporators and their associates to whom the Charters are tendered by the State, in consideration of the privileges granted and the provisions for immunity from taxation, other than the annual bonus stipulated for in the acts, are induced to accept the same and invest their private funds in corporate enterprises, deemed by the Legislature beneficial to the community. *They are now* told that they were no parties to this contract and not entitled to its benefits; that the State's *contract* was with the *corporation*, the *legal entity*, and simply meant that *it* should pay no further or other tax on *its capital stock and franchises.* To sustain this position, would be to allow the State to "make the promise to the ear but break it to the hope."

If the stockholders in these companies are now liable to taxation on their shares of stock, "*the exemption clauses*, (as stated by the Supreme Court of New Jersey, 3 Zabriskie 500) *were not worth the paper upon which they were written.*" They are in fact, *worse* than useless under the present revenue system of the State, for by the 9th section of the revenue act, passed March 1st, 1869, it is provided, "that no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company organized under the authority of this State or United States; but the stockholders in such banks or other corporations shall be assessed and taxed on the value of their shares of stock therein." So that other banks or corporations without such exemption clauses or contracts *now* go *untaxed* on their capital, while the present companies continue to pay the annual tax or bonus of one-half of one per cent. on each share of capital stock subscribed, and their stockholders, the

beneficial proprietors of the corporation, are required to pay a separate tax on the value of their shares of stock. This is so manifestly at variance with the purpose and intent of these exempting clauses, so unjust in principle, and so nearly double taxation, that this Court should give such construction to the contract for exemption as will effectuate the true intention of the parties and prevent the injustice. Under the revenue law of 1869–'70, the State imposes a tax of 40 cents on the $100 of *valuation*. These companies have, since their organization, and do now pay annually to the State one-half of one per cent., or 50 cents *on each share* ($100) of their capital stock *without regard to its value*. The Legislature and the corporators supposing this *annual bonus* to be a full and fair equivalent for the surrender by the State of its taxing power, expressly declare their intention that it shall so operate, in the super-added stipulation, "*which shall be in lieu of all other taxes.*"

We submit that the construction which the Supreme Court of Tennessee has placed upon the exemption clauses in the present cases fails to give any force, meaning or effect to this important and comprehensive provision, that said annual tax "*shall be in lieu of all other taxes.*" Under this construction, the operation of the exemption is confined and limited to the *franchise and capital stock* of the corporations. Now, it is well settled in Tennessee, that a provision or stipulation in an Act of Incorporation for the payment by the company to the State, of a simple bonus or annual tax, *without more*, will operate as an exemption of the corporate franchises and *capital stock* from further and other taxation, either by the State, counties or municipalities. This rule of construction was established as early as 1836, in the case of the Union Bank vs. The State, 9 Yerger, 490. By the 11th section of the bank's Charter, it was stipulated "*That in consideration of the privileges granted by the Charter, the bank agrees to pay annually, the one-half of one per cent. on the amount of the capital stock paid in by stockholders other than the State.*" The State, and the County of Davidson, under the general Revenue Law of 1835, levied an additional tax upon the capital stock of

the bank. The Supreme Court of the State held that a law imposing an additional tax, either upon the franchise or capital stock of the bank, beyond what the State in the Charter stipulated for, impaired the contract and was unconstitutional, that the above section protected the bank from all other or further taxation, either on its capital stock or its franchises. It will be noticed that this Union Bank Charter contained no stipulation that the annual tax, which the bank agreed to pay "*on condition of the privileges granted*" *should* "*be in lieu of all other taxes.*" The exemption clause in that case simply fixed an annual tax or bonus to be paid by the bank "*in consideration* of the privileges granted," without more. This of itself operated as an exemption of both the capital stock and franchises of the bank. In the present cases we have in addition to this fixed annual tax or bonus, the highly important super-added provision that said tax "*shall be in lieu of all other taxes,*" which according to the decision of the Supreme Court of Tennessee, in these cases, means nothing, and adds nothing to the force or legal effect of the exemption. If the purpose and intent of the parties to the contract was simply to protect the *corporate franchises and capital stock* from additional taxation, there was no necessity whatever for the comprehensive stipulation that the annual tax or bonus "*should be in lieu of all other taxes.*" If the exemption clauses in question had simply provided that the corporations should pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, without the super-added stipulation that said tax should "*be in lieu of all other taxes,*" this under the authority of Union Bank vs. State, 9 Yerger, 490, would have precluded the State from imposing any other or further tax upon the companies, either on their franchises or capital stock. The State's power of taxing the *capital stock or franchises* of the companies, isexhausted by the first portion of the exemption clause, providing for the payment of an annual tax of one-half of one per cent. on each share of stock subscribed. Then comes the super-added stipulation that said tax "*shall be in lieu of all other taxes.*" After the franchise and capital stock are withdrawn from

further or other taxation by the provision for the payment of an annual tax of one-half of one per cent. on each share of the capital stock, the super-added stipulation "*which shall be in lieu of all other taxes*," has nothing to operate on except the shares of the stockholders. What other subject of taxation was there connected with these corporations after the franchises and capital stock are excluded? None except the shares of stock held by the stockholders. Then it follows inevitably that the super-added stipulation, "*which shall be in lieu of all other taxes*," must embrace and include the shares of the stockholders if it is to have any force or meaning whatever. This is the construction which this Court placed upon the exemption clauses in Gordon's case, 3 Howard. Mr. Justice Wayne saying upon this point: "The power of "the State to lay any further tax upon the franchise (and "capital stock) was exhausted. That is, the contract between "the State and the banks. It follows, then, as a matter of "course, when the Legislature go out of the contract, pro- "posing to pledge its faith, if the banks shall accept the Act "*not to impose any further tax or burden* upon them, that it "must have meant by these words an *exemption from some other "tax than a further tax upon the franchises* (*and as decided in* 9 "*Yerger*,) *and the capital stock of the banks. The latter was al- "ready provided against. To confine the pledge to any further tax "upon the franchise* (*or capital stock*) *surrenders the whole clause "as a substantive enactment, to a supposed needless declaration of "the Legislature, that it would not do what it had stipulated by its "contract not to do.*"

When the parties to the contract agree that a certain sum or commutation tax (which of itself excludes any further or other taxation of the capital stock and franchises of the corporation) "*shall be in lieu of all other taxes*," it violates all principle and rules of construction to treat such a "substantive enactment" or stipulation as mere *surplusage*, or a mere provision for what was already provided against. The fair import and meaning of the contract is that *all other taxes* which the State might or could otherwise have levied and assessed as connected with or growing out of the organiza-

tion of these corporations, are surrendered in consideration of the annual bonus of one-half of one per cent. on each share of the capital stock.

When the present Charter was granted, the Union Bank case, 9 Yerger, had settled the construction (as above explained) to be placed upon exemption clauses simply providing for the payment of a bonus to the State; while the Gordon case, 3 Howard, had settled the construction that should be placed upon the super-added stipulation that said annual bonus should "*be in lieu of all other taxes*;" and it is fair to assume that the Legislature and the corporators used and understood the terms and stipulations of the present exemption clauses, in the *sense* of the previous judicial construction. This would be in accordance with the well settled rule, that words in statutes which have received judicial construction, shall, in subsequent statutes, be construed in that sense. On this principle, the case of Piqua Bank vs. Knoop, 16 Howard, 369, was partially decided.

The majority opinion of the Supreme Court of Tennessee, while conceding that the true construction and meaning of the present *Charter contracts* for exemption "is a question on which we are bound by the decisions of the Supreme Court of the United States, inasmuch as on the question of whether the act of the Legislature of Tennessee. imposing the tax on the shares of stock impairs the obligation of the contract contained in the Charter, our decision may in one event be revised by the Federal Supreme Court, &c.," have attempted to distinguish these cases from the 3d Howard case, upon grounds which are entirely unsound in principle and unsupported by anthority.

The first point of distinction relied on is, that in the Gordon case "there was a *bona fide* and real purchase of the franchise, the *extension of the Charter*, and a real consideration paid for the exemption given." That in the present cases there "is no *bona fide and real purchase* for a consideration actually paid or agreed to be paid. It is simply an amount to be paid by the corporate body thus created as an annual tax."

Now the doctrine is distinctly held in Gordon vs. Appeal Tax Court, 3 Howard, 388, 390, and in the Ohio Life Insurance Co. vs. Debott, 16 Howard, 416, and recognized in numerous other cases, that even when no fixed price or actual consideration is paid or agreed to be paid by the corporation, the exemption may be sustained on the *mere ground* of the supposed benefits to be derived by the public from the company.

2 Redfield, Law of Railways, (5th ed.) p. 429.

On this precise point McLean, Judge, delivering the opinion of this Court in the State Bank vs. Knoop, 16 Howard, p. 390, says: "Much stress was laid on the argument and in the decisions of the Supreme Court (of Ohio) on the fact that the banks *paid no bonus* for their Charter, and that no contract can be binding which is not mutual. This is a matter which can *have no influence* in deciding the legal question. The State did not require a *bonus*, but other requisitions are found in the Charter which the Legislature deemed sufficient, and this is not questionable by any other authority. *The obligation is as strong on the State, from the privileges granted and accepted, as if a bonus had been paid.*" In Home of the Friendless vs. Rouse, 8 Wallace, 437, it is said: "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the Legislature to be beneficial to the community, and this benefit *constitutes the consideration* for the contract, and *no other is required to support it.* This has been the well settled doctrine of this Court on this subject since the case of Dartmouth College vs. Woodward."

But in the present cases, there was, in addition to the supposed benefit to the public, a real and substantial *bonus* to be paid *annually* by the companies viz: "one-half of one per cent. on each share of their capital stock subscribed," which the companies have regularly paid since their organization. As stated by Mr. Judge McLean in the above opinion. "Of *the sufficiency* of the consideration, whether it was a *bonus* paid by the bank or in supplying a sound currency, the Legislature

would be the exclusive judges." The nature or "quantum" of the consideration or bonus to be paid for the exemption can in no way change or alter the construction to be placed upon the contract.

The next ground relied on to distinguish the present from the Gordon case is, that the Maryland banks "were actually existent corporations competent to contract, and in making the contract (with the State for the extension of their Charter) the *stockholders* were required to be and were actually parties assenting to the terms and agreeing to pay for the benefits conferred, and stipulating for the additional benefit, to-wit: The exemption from any further tax or burden upon them during the continuance of their Charter. They might well have been held in this case to have been stipulating for a benefit in favor of their private property (*shares of stock*)."

The Supreme Court then assert the proposition that the stockholders are not entitled to the benefit of the exemption in the present case, because "the contract (here) so far as it "is one, is *alone* with the *corporation* thus created, the *corporate* "*body alone being party to it.* No stockholders are in existence "at the time. They cannot therefore, as in the case of the "Maryland bank, be held to be stipulating for benefits or "exemptions in favor of the shares of stock owned by them. "The *corporate body alone* is stipulating as to a burden im- "posed on it. Call it by a legal fiction—a purchase—the "body is but stipulating for the purchase of the franchise and "to acquire property in the form of capital stock." The same position is again announced on page // of the majority opinion as follows; "*We hold that the contract was complete when* "*the act (of incorporation) was passed as between the parties to it,* "*the State and the Company.* The franchise was granted. The "after organization of the company was but the means by "which it was to be used for the purpose of the grant. The "stockholders but purchased stock in a company, which "company had a contract for exemption of its capital stock "and franchises from all taxes, except one-half of one per "cent. on each share, &c."

This assumes that a corporation was *formed and became a party to a contract before the corporators* and their associates had *accepted* the Charter and *subscribed* for the amount of capital stock required by the act of incorporation. We submit that the law in respect to private corporations like the present, is just the *reverse* of the proposition here announced, that until the corporators have accepted the charter tendered by the State and subscribed for the required amount of capital stock, *there is no corporate body in existence.*

Take one of these acts of incorporation for an illustration. By the first section of the act to incorporate the "Bluff City Insurance Company," it is enacted, "that T. W. Hunt, Charles Potter, Samuel Webb and W. E. Milton and their associates and successors be and they are hereby created a body politic and corporate, by the name and style of the Bluff City Insurance Company at Memphis, &c."

By second section, it is further enacted, "That the capital stock of said company shall be $300,000, divided into shares of $100 each, *and when* 1000 *shares shall have been subscribed, and the sum of* $10,000 *paid therein, the stockholders may meet and elect five directors, &c.*"

Now it is well settled in respect to private corporations like the present, that in order to give the Charter the full force and effect of an executed contract, it must be *accepted* by the corporators and their associates, that until such acceptance and completion of the organization, there is no corporate body in existence. In the words of McLean, Judge, "The *organization being completed, existence* is given to the artificial being and its agency commences. It is now "*in esse*," but before this, it was not. Vitality is given to it by the voluntary association and organization of its members. Had they remained passive, the law would have had no effect." Falconer vs. Higgins, 2 McLean, C. C. R., 196.

So in Crocker vs. Crane, 21 Wendel, N. Y. R., p. 212, it was held that "where a statute declares that A, B and C and such other persons as shall hereafter become stockholders of

said company, are hereby constituted a body corporate and politic by the name of, &c., *no corporation exists*, if there be no stock distributed. The distribution of the stock is a condition precedent to the existence of the corporation." See also—

Angell & Ames on Corporations, 9th ed., sec. 81.
1 Redfield on the Law of Railways, 5th ed. top pp. 70 and 71, and cases cited.

It follows from these authorities, that the corporators and stockholders had, in the present cases, *first* to accept the proffered Acts of Incorporation, just as the stockholders accepted the *extension* of their Charter in the Maryland or Gordon case, before any contract was made and completed with the State. And "we must (as stated in the Gordon case) *look in what character or by whose assent it was to become a contract with the State, to ascertain the intention of the Legislature in making the pledge*," that the annual tax of one-half of one per cent. on each share of the capital stock subscribed, "*shall be in lieu of all other taxes.*"

3 Sneed Tenn. Rep. 627

See Humphreys vs. Pegues, 16 Wallace, 244, and Cooley on Taxation, p. 55.

The Charter of a private corporation is declared to be a *contract* between the State and the *corporators*. 13 Wallace 266

The cases of Van Allen vs. The Assessors, 3 Wallace, 573, and People vs. The Commissioners, 4 Wallace, 244, on which the Supreme Court of Tennessee to some extent rely in support of their decision, have really no bearing or application in these cases. The National Bank Act contained an express provision, that the shares of stock in the National banks might be included in the personal property of the owners for taxation under State authority with certain restrictions intended to prevent unjust discrimination against the same. As stated by Mr. Justice Nelson in Van Allen's case: "The State tax, under the Act of Congress *involves no question* as to the pledged faith of the Government." In the 4 Wallace case, p. 259, Mr. Justice Nelson expressly declares that these cases are not in conflict with Gordon vs. Appeal Tax Court,

3 Howard. He says: "It was supposed, in the argument, that this principle, (the distinction between tax on shares and tax on capital stock) was in conflict with that which governed the decision of this Court in the case of Gordon vs. Appeal Tax Court, *but this is a mistake.* That case turned upon the construction of an Act of Maryland exempting the bank from taxation on account of a large bonus to the State for the extension of the Charter. This Court held, that upon a true construction of the Act, the stockholders were within the scope of the exemption." No doubt whatever is expressed or intimated as to the correctness of this Gordon decision.

We have not considered it necessary to notice or comment upon that class of cases of which Christ's Church vs. Philadelphia, 24 Howard, 300, and Salt Co. vs. East Saginaw, 13 Wallace, 373, are examples—where mere *bounties* or *licenses* are conferred or granted by Legislative act, and which the Legislature may revoke, without violating or impairing the obligation of any contract. They rest upon principles different from those applicable to *Charter contracts.*

The clauses in these Charters are clearly *express* "contracts not to tax." There is no room for implication, and hence such cases as Erie Railway Co. vs. Pennsylvania, 21 Wall., 492, and North Missouri R. R. vs. Maguire, 20 Wall., 46, are not authorities bearing legitimately on the case.

ESTES, JACKSON & ELLETT,
Of Counsel for Plaintiffs in Error.

In the Supreme Court of United States,

WILLIAM M. FARRINGTON,

Shareholder in the Union and Planters Bank,

vs.

THE STATE OF TENNESSEE

AND

THE COUNTY OF SHELBY.

Argument of L. D. McKisick

FOR PLAINTIFF IN ERROR

In the Supreme Court of the United States.

This argument was prepared for the Supreme Court of Tennessee, on the rehearing, to answer the argument of that Court upon the question of the power of the Legislature to make the charter contracts under the State Constitution.

In the Supreme Court of Tennessee.

THE STATE OF TENNESSEE,
THE COUNTY OF SHELBY, and
THE CITY OF MEMPHIS,
vs.
WILLIAM M. FARRINGTON,
Shareholder in the Union and Planters Bank

} For Defendant.

In the agreed cases it is admitted that the Union and Planters Bank of Memphis was duly organized under its charter, granted by the Legislature of the State of Tennessee, on the 20th of March, 1858, and 12th of February, 1869.

The 10th section of the charter is admitted to be in the following words: "That said company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

It is further agreed that 6750 shares of stock have been subscribed, and that the defendant Farrington owns 150 shares, and that they are of par value.

Under the revenue act of 1869-70, the shares of the bank have been assessed for taxation in the hands of the shareholders. This is resisted upon the ground that to levy a tax

upon these shares is to impair the obligation of the contract made by the State with the corporators when they accepted the charter, and is therefore in violation of § 10 of Art. I of the Constitution of the United States.

In the language of the Supreme Court of Tennessee, 9 Yerger, 494: "Ever since the determination of the great case of the Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 518, it has been considered as settled beyond controversy, that a charter of incorporation is a contract, and that any statute altering it in a material respect, without the consent of the corporation, is a law impairing the obligation of the charter, and is unconstitutional and void."

Assuming that the foregoing proposition will be admitted, the question to be determined by the Court is: Did the Legislature have the power, under the Constitution of 1834, to authorize or consent to a stipulation in the contract of incorporation, exempting the property, or any part of the property of the corporation, or its stockholders, from taxation?

The sections of the Constitution necessary to be examined are as follows:

1st. Section 28, of Art. 2: "All land liable to taxation, held by deed, grant or entry, town lots, *bank stock*, slaves between the ages of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, *shall be taxable.* All property shall be taxed according to its value—that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State. No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value. But the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct."

2d. Section 7 of Art. 11 provides: "The Legislature shall have no power to suspend any general law for the benefit of

any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land. Nor to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. *Provided always*, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good."

Do the words "*shall be taxable*," as used in sec. 28 of Art. 2, mean "*shall be taxed*," or simply "*are subject to taxation*" *when the Legislature from time to time may deem it expedient?*

In Johnson and Walker's Dictionary, p. 915, the definition is given of the word "taxable," "*that may be taxed*," citing "*Sherwood*" as authority.

In Webster's Dictionary, p. 1481, the definition is the same, to-wit: "*Taxable—that may be taxed*," citing as authority, *Mr. Burke.*

Grammarians universally give this addenda "*able*," when annexed to nouns, as having the effect of changing them to adjectives and giving the meaning as something "*that may be done, not, that shall be done.*" Then I take it that the appropriate and precise, as well as the popular meaning of the word "*taxable*," is "that *may be taxed.*"

In Bouvier's Law Dictionary, at p. 567, clause 4th, under the word taxes, he uses the following expression: "Congress have plenary power over every species of taxable property, except exports." Now evidently the word is here used in the sense of "*that may be taxed.*"

So that, looking to the popular, to the technical, appropriate and precise, and to the legal meaning of the word, we conclude that its proper signification is, "that *may be taxed*," not "*shall be taxed.*" This meaning is the usual and most known signification, and accords with the propriety of gram-

mar. Indeed the word is so plain and clear, and its sense so distinct and perfect, as not to permit or call for interpretation. It is a well established rule of construction for constitutions, that every word employed in the constitution is to be expounded in its plain, obvious and common sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. The people made and adopted it; the people only read it with the help of common sense, and so it must be interpreted.

Story's Constitution, sec. 210.
Cooley Con. Lim., pp. 55, 56, 57.

But let us examine the whole of this first clause of the 28th sec. of Art. 2. If the framers of the Constitution meant the word taxable to signify shall be taxed, why did they say all lands "liable to taxation?" See how it would read, "all lands, *liable to taxation*, shall be taxed." Yet during the whole period of the existence of the Constitution of 1834, the Legislature have from time to time exempted lands belonging to literary, religious and eleemosynary institutions.

This practical construction has been uniformly given, and it is wholly at variance with the argument that the phrase is imperative.

Again, this clause clearly manifests an intention to leave to the discretion of the Legislature what property should from time to time be taxed. It only enumerates as taxable, *lands*, *bank stock* and *slaves;* then adds, and *such other property as the Legislature may from time to time deem expedient.*

That only three kinds of property are enumerated as taxable, and the taxability of all other property is left to the discretion of the Legislature, to be exercised from time to time, furnishes a strong argument that the word taxable is not used in the sense of *shall be taxed.* Why declare that land, bank stock and slaves shall be taxed, and leave the taxation of all other property to the discretion of the Legislature? Is there

any imaginable reason why these three species of property should be made forever subject to taxation, and all other property left only to be taxed in the discretion of the Legislature? There was nothing in the history of the country which demanded such discrimination against lands, bank stock and slaves.

The State was a new one, sparsely inhabited, with scarcely any capital, with few slaves, and with vast areas of virgin land needing labor, and with great mineral wealth needing capital; there existed every reason against such a discrimination, and those reasons were well understood by the public men of Tennessee of that day; they manifested their appreciation of the facts by directing the legislation of the country to the fostering and cherishing of immigration to the State to occupy the waste land, and to the influx of capital to develop the resources of the State. Several banks had been chartered with exemptions from taxation. The very same word used to signify the taxability of lands, bank stock and slaves, was also used to signify the taxability of such property as the Legislature might from time to time deem expedient. No one will for a moment believe, that the Constitution means that this *other property* to be designated by the Legislature, shall, on being once designated as taxable, become forever subject to taxation. This would be permitting one Legislature forever to tie the hands of all subsequent Legislatures, without reason and without consideration. But the very same word used to signify the taxability of lands, bank stock and slaves, is used to signify the taxability of the other property, and having ascertained, that as applied to the latter species of property, it must be discretionary, how can a different meaning be given to the same word as applied to the former? Does any one believe that the people, taking a common sense view of the clause, could possibly have understood a word in a sentence to have two different meanings as it there stands? That the clause, "such other property" (shall be taxable) as the Legislature may "from time to time deem expedient," leaves it discretionary with the Legislature to tax "*such other prop-*

erty" or not, as they may deem expedient, is too clear, plain and manifest, to admit of a moment's doubt; then it follows inevitably that the same word (taxable) has the same meaning as applied to the other antecedents of the same clause—otherwise you would have the same *predicate* following several *subjects* or antecedents, meaning or affirming one thing as to a part of its antecedents, and another as to the others, and this without any qualifying word to indicate it. Such a sentence as this would be, can not be found in any language or on any subject, sacred or profane, scientific or popular.

But our own Supreme Court has said that the Legislature could exempt lands, &c.

And the Code, a work digested and composed by three of our most profound and learned lawyers, sec. 542, shows how they construed exemptions and the power of the Legislature to exempt. And that section is sub-divided into fourteen sub-sections, each of which exempts property from taxation, some of which would be taxable, except for the exemption. The 13th sub-section reads as follows: "All capital or property of every incorporated company, exempt from taxation in its charter."

The argument on the first clause, if correct, at once removes all difficulty on the second clause. This second clause reads: "All property shall be taxed according to its value." It simply means all property that is taxed by any revenue bill, shall be taxed according to its value; it does not refer to exemptions, nor restrain nor limit them. It simply lays down a rule for taxing property all over the State, that is taxed, so as to procure equality and uniformity throughout the State. "No one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value." This clause simply means that when the Legislature lays taxes on different species, sorts or kinds of property, it shall not tax one species higher than another; it never was intended by this clause to restrain or prohibit exemptions; it wholly fails to express that idea at all.

This has been the uniform, practical construction of it. The Legislature never deemed that they were violating this rule when they exempted, as they have uniformly done every year from taxation, all lands held by literary, scientific or benevolent institutions, all houses of religious worship and their appurtenances, and lands appropriated for the use of schools, and held in trust for the use of a college, academy or other seminaries of education, and these exemptions have been continually sustained by the Supreme Court. The different species of property must be taxed at the same rate, according to valuation all over the State, and yet the Legislature may exempt some of any or each species of property. This rule has nothing to do with exemptions, and no reference to them. No one can doubt that the next clause is simply intended as an exception to the preceding clauses—"But the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct." This was intended to prevent peddlers, merchants and other persons exercising privileges, from setting up the foregoing rules after they had paid the property tax on their merchandise; from setting up their prior payment as a defense against the payment of a license or privilege tax. In Brown vs. the State of Maryland, the Supreme Court of the United States had decided (Chief Justice Marshall delivering the opinion), that a State tax on the license was a tax on the goods. This was the leading case in the United States, and doubtless this proviso as to merchants, peddlers and privileges was inserted to meet this view, should the same objection be raised to taxes on merchants, &c., under the State Constitution.

My first proposition is, that the phrase "*shall be taxable*," in section 28 of Art. 2, is not imperative; that it was not so understood by the members of the Convention who framed the Constitution of 1834; that it was not so understood by any Legislature that ever assembled under that Constitution, and that it was not so understood by any Supreme Court that ever sat under that Constitution; and lastly, it was not so understood by the members of the Convention who framed the Constitution of 1870.

The Convention which framed the Constitution of 1834, contained many of the most profound jurists and statesmen of that day. The first General Assembly which met after the adoption of that Constitution, was composed of many of the gentlemen who had been members of the Convention. Jonathan Webster, H. C. Armstrong, Terry H. Cahal, William G. Childress, Boling Gordon, William Ledbetter and Julius C. N. Robertson were members of the Convention, and were also members of the State Senate, at the session commencing October 14, 1835. West H. Humphreys was a member of the Convention, and also a member of the House. All of these gentlemen were accomplished lawyers. In addition to those who had been members of the Convention, there were in this, the first General Assembly which met under that Constitution, some twenty-five others of the ablest lawyers in the State, among them the present Chief Justice, and the Hon. R. L. Caruthers, who so lately adorned and shed lustre on this bench, and many others, who have achieved an honorable national fame. One-third of the whole body were lawyers, and one-seventh had been members of the Convention. On the 5th day of February, 1836, Acts 1835–6, ch. 13, pp. 58, 59, this Legislature passed a general revenue law, setting forth and declaring the property, privileges and occupations liable to taxation, and what was and should be exempt from taxation.

The first section of the Act contains in substance, in almost the exact words and order, the first clause of section 28 of Art. 2 of the Constitution, with this significant difference—"*bank stock* other than such as may be *exempt* from taxation as hereinafter provided." Section 2 specifies the exemptions, and among others the following: "Stocks owned by the State, or by literary, religious or charitable institutions, all capital stock or property of all such incorporated companies as have heretofore been or may *hereafter be exempt from taxation in their respective charters of incorporation*, shall be and the same are hereby exempt from the payment of any State, county, or other tax."

On the 14th of December, 1835, this same Legislature granted a charter to the Memphis and LaGrange Railroad Company, in which an exemption from taxation of their entire capital stock and property was expressly made for twenty years. In addition to the exemptions recognized and contained in the General Revenue Act and the Memphis and LaGrange Railroad charter, there were other charters granted to turnpike companies containing exemptions from taxation, similar to the Franklin Turnpike Company, which had been chartered before the Constitution of 1834 was adopted, the charter of which exempted the property of that company from taxation.

But again, the Legislature of 1837–8, the second after the adoption of the Constitution of 1834, and composed in part of some of the members of the Convention, chartered the Western Railroad Bank. Ch. 6, passed December 5, 1837, p. 23, sec. 25, provides: "The capital of the said bank, and all the funds thereof, the shares of the stockholders therein, and the dividends thereof, shall be free and exempt from taxation of every kind, until the railroad shall be finished and a dividend of six per cent. per annum paid." So the sixth section of the charter of the Lebanon and Sparta Turnpike Company, passed at the same session, provides: "the property in said road shall vest in said company, and shall not be liable to taxation." The charter of the Knoxville and Cumberland Turnpike Company, passed at same session, contains the same exemption. So too the 8th section of the charter of the Ashport Turnpike Company, passed at the same session, contains the same exemption. So too the 12th section of the R. and Jackson Turnpike Company, passed at the same session, contains the same exemption. So too the Knoxville and New Market Company. So too the Charlotte Turnpike Company. Without further enumeration, there were nearly twenty turnpike companies chartered at that session, 1837–38, all containing exemptions from taxation.

Acts, 1837–38, pp. 23, 323, 376, 383, 426.

Certainly the provisions of the General Revenue Act of 1835–36 and the provisions in the various charters cited are conclusive of two facts: First, the framers of the Constitution of 1834, and the eminent citizens of the State who largely composed the two General Assemblies which first sat under that Constitution, did not believe that the Constitution imperatively required them to tax all the property in the State by a fixed, unbending rule. Second, they believed that in creating corporate property, they could tax it or not, as they might deem it expedient for the public good.

And these opinions prevailed and were practically carried out by every Legislature which assembled under that Constitution for a period of thirty-six years — eighteen General Assemblies. During that period the Legislature incorporated nearly one hundred and fifty companies. Banks, insurance companies, railroads, turnpikes and various other enterprises, containing total or partial exemptions from taxation. Some of them for the whole period of their corporate existence, others for a limited period. Some of them for a definite period, as for twenty years, as in the Memphis and LaGrange Railroad charter. Others indefinite, as in the Western Railroad Bank, which was exempt until the road was finished and paid an annual dividend of six per cent. It is a significant fact that the Legislature of 1835–6, which did not understand the phrase "shall be taxable" to be imperative, did so understand that clause of the Constitution relating to the prohibition of lotteries and usury, and laws were passed making it a penal offense to deal in the one or receive the other.

Second. No reported decision of the Supreme Court of Tennessee can be found which intimates a doubt of the power of the Legislature to exempt property from taxation in whole or in part. While Judge McKinney, who was a member of the Constitutional Convention of 1834, says the power of the Legislature to do so is "unquestionable."

McCallie vs. Mayor, 3 Head, 318.

It is said that this expression is mere dictum. Granted, but

it is nevertheless the solemn enunciation of his opinion, by one of the most eminent judges who ever sat upon the bench in this State; one of the fathers of the Constitution; a judge who had judicially expounded nearly every section and article of that Constitution which he had aided in framing; who had been upon the Supreme bench nearly twenty years when that opinion was delivered, and who was remarkable for his familiarity with the judicial history of the State, and the reported and unreported decisions of the Supreme Court. And at least one member of the present Court has twice expressed the same opinion—Judge McFarland, in McLaughlin vs. the Mayor at Nashville, and Memphis vs. the Turley Institute at Jackson.

It is not singular that this question never arose for decision by the Supreme Court until now, for the reason that the uniform course of legislation under the Constitution of 1834 recognized the validity of the exemptions which had been made—the revenue act of 1869–70 being the first one inconsistent with that of 1835–6.

Third. The members of the Convention who framed the Constitution of 1870 did not understand the phrase "shall be taxable" to be imperative, because they changed the phraseology of section 28, Art. 2, so as to make it read thus: "All property—real, personal, or mixed—*shall be taxed.*"

Upon authority, it is insisted that the construction placed upon the 28th section of Art. 2 of the Constitution of 1834, by the Legislature, by the Judges of the Supreme Court who sat under that Constitution, and by the framers of the present Constitution, ought to be conclusive upon this Court. In the case of Stewart vs. Laird, 1 Cranch, 299, decided in 1803, involving the right of Judges of the Supreme Court to sit as Circuit Judges, the Court said: "It is sufficient to observe that practice and the acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a cotemporary interpretation of the

most forcible nature. This practical exposition is too strong and obstinate to be controlled." In Martin vs. Hunter, 1 Wheaton, 351, Judge Story, arguing that the 25th section of the judiciary act was supported by the letter and spirit of the Constitution, lays great stress upon the acts and declarations of those who assisted in framing the Constitution: upon the practice of the Supreme Court and the acquiescence of the State Courts, and says: "This weight of contemporaneous exposition by all parties, this acquiescence by enlightened State Courts, and these judicial decisions by the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken." In Cohens vs. Virginia, 6 Wheat., 418, Chief Justice Marshall said, "great weight has always been attached, and very rightfully attached, to contemporaneous exposition." In Ogden vs. Sanders, 12 Wheat., 290, Mr. Justice Johnson assigns the following reasons why contemporaneous construction should have so much weight: "It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right because they had the best opportunities of informing themselves from the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them." In Rogers vs. Goodwin, 2 Mass., 478, the Supreme Court of Massachusetts, in strong language, adopted the practical construction which had been placed upon a statute. And in the State vs. Mayhew, 2 Gill, 487, the Supreme Court of Maryland used strong language when the point involved was the possession of a certain power by the Legislature which it had constantly exercised for nearly seventy years.

The same doctrine has been recognized by the Supreme Courts of Kentucky; 4 T. B. Monroe, 42; Texas, 22; Texas, 304; 188 Miss., 185; 11 Wend., 511; 3 S. & R., 63; 21 Penn. St.; 4 Cal., 37; Cooley on "Contemporaneous and Practical Construction," p. 67; 19 Ark., 369.

If it is established, that the 28th section of Art. 2 of the Constitution does not imperatively require the Legislature to

levy a tax upon all the property mentioned in the section, it follows absolutely that the Legislature possessed a discretionary or modified power over the question of taxation. But it is insisted in support of the revenue act of 1869–70, that, granting that the Legislature had the power under the Constitution of 1834 to exempt property from taxation entirely, it did not have the power to do so in a modified form, for the reason that the Constitution requires "all property to be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State," and that the Legislature had no power to make a contract by which the property of the corporations or of their stockholders could be taxed except in accordance with the rule of equality and uniformity, and that an attempt to fix an arbitrary tax in the charter is violative of the principle prescribed by the Constitution, and that the power so to tax did not exist, and the contract for the same is void for want of authority to make it, the same being forbidden by the Constitution. It is admitted that the Legislature had the power to grant the charters, by virtue of the proviso to the 7th section of Art. 11. We have seen that the Supreme Court of Tennessee, as long ago as the Union Bank vs. the State, 9 Yerg., recognized the doctrine laid down by the Supreme Court in the Dartmouth College case, and ever since followed, that a charter of a private corporation is a contract. These charters, then, are nothing but contracts between the State and the corporators. Every contract involves three principal elements: parties, subject matter, and consideration; without the last there is no contract, but a mere *nudum pactum*. Can it be that the proviso to the 7th section of Art. 11 was intended to confer upon the Legislature authority to enter into a mere *nudum pactum?*

But it is said, whatever consideration the Legislature was authorized to agree upon, it did not involve the taxing power, for the reason that it was expressly forbidden to violate the rule of equality and uniformity. We grant broadly that

whenever the Legislature levies a tax within the ordinary acceptation of that word, it must be in accordance with the rule of equality and uniformity—but we insist that we have established that the Legislature had the power to exempt property from taxation independent of the proviso to section 7 of Art. 11, and that it follows, if the Legislature had the power to do so without any consideration at all expressed in the act, it could certainly do so as a consideration for a contract which it was expressly authorized to make, and that consequently the rate per cent. or annual tax agreed to be paid by these corporations for their franchises *is no tax at all in the sense in which that word is used in section 28 of Art. 2*; but that it is really and truly a *consideration* paid for *exemption from taxation*—the consideration with which we purchased the franchise and the exemption. *Not a rule of taxation at all.*

And it is no answer to our position that we are exempt from taxation, to reply that we must be taxed by a uniform rule, because that rule does not require it. Mr. Cooley says, p. 514: "The rule of uniformity requires an apportionment among all the subjects of taxation within the district, but it does not require that everything which the Legislature might make taxable, shall be made so in fact. Many exemptions are usually made from taxation for reasons the cogency of which is at once apparent." On p. 515 he says: "Property is sometimes released from taxation by contract with the State and corporations, and specified occupations are sometimes charged with specific taxes in lieu of all taxation of their property." "The constitutional requirement of equality and uniformity only extends to such objects of taxation as the Legislature shall determine to be properly subject to the burden." And Mr. Cooley, on p. 127, says: "And it now seems to be settled by the decisions of the Supreme Court of the United States, that a State, by contract to that effect based upon a consideration, may exempt the property of an individual or corporation from taxation for any specified period or permanently;" and on p. 280 he says: "So far as the power of taxation is concerned, it has been so often

decided by the Supreme Court of the United States, though not without remonstrance on the part of the State Courts, that an agreement by a State for a consideration received or supposed to be received, that certain property rights or franchises shall be exempt from taxation, or be taxed only at a certain agreed rate, is a contract protected by the Constitution, that the question can no longer be considered an open one." This language was adopted by this Court in the case of the City of Memphis vs. Hernando Insurance Company, April term, 1872, involving a construction of a charter precisely similar to that of the Union and Planters Bank, and it has been twice stated to be no longer an open question by the Supreme Court of the United States, since Mr. Cooley wrote the paragraph; in Read vs. the Railroad, 13 Wal., 264, and Peagues vs. Humphreys, 16 Wal., 244.

We insist that the case of Memphis vs. the Hernando Insurance Company conclusively settles the question of the authority of the Legislature to make an agreement for a consideration that certain property rights and franchises shall be exempt from taxation, or be taxed only at a certain agreed rate. After quoting the charter, Nicholson, C. J., says: "Whether wise or unwisely, it is clear that the Legislature by this language has estopped itself from imposing any other tax for State purposes, and has agreed that the companies shall be exempt from '*all other taxes.*' This must necessarily operate as a prohibition against the imposition of taxes, either by the State, County or City Government."

But it is said that that case only raised the question of the right to impose a privilege tax or license on these corporations, and that the case rests upon that clause of the Constitution which provides that "the Legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct." But we answer that the Legislature can no more disregard the rule of uniformity in levying a tax on "merchants, peddlers and privileges" than it can in levying a tax on property. If it be a tax at all

within the legal definition of that term, it must be a uniform tax, not an arbitrary privilege tax of $5000 upon the merchants on the east side of Main street, in the city of Memphis, and only $1000 upon those on the west side of the same street; or a privilege tax of $10,000 upon the franchise of banking on the south side of Madison street, and $5000 upon those who do the same kind of business on the north side. And yet if the consideration, or bonus, or annual tax paid by these corporations according to the stipulations in their charters, be a tax at all, we have had in the city of Memphis these very diverse rules of taxation; for there are banks and insurance companies now doing business in that city that have no stipulation as to taxes in their charters, and have always heretofore been assessed under the general revenue laws of the State. The cases of Nashville vs. Althorp, 5 Cold., 554, Budd vs. the State, 3 Hump., 483, 2 Yerg., 554, 5 Yerg., 320, 10 Yerg., 59, 1 Hump., 156, 162, 232 and 241, involving various questions relating to privilege taxes, conclusively show that the Legislature can no more pass laws fixing arbitrary taxes upon privileges, than it can pass a law levying taxes in violation of the rule of equal value and uniformity. Hence we deny that the case of the Hernando Insurance Company stands upon the narrow ground where the argument would place it.

But it is intimated that the decision in the Hernando case is unsound, and the correctness of the principle decided in that case is seriously questioned, because, as is argued, the Legislature cannot tax in any other mode than the one prescribed in section 28, Art. 2; whether by special law in the form of a contract, or a general law; any property made taxable by said clause, and the decisions of the Supreme Court of Wisconsin as approved and followed by the Supreme Court of the United States in the case of Gilman vs. the City of Sheboygan, 2 Black, 510, are relied upon as sustaining the construction contended for. A review of the Wisconsin cases will, we think, conclusively show that they do not sustain the position.

The present Constitution of Wisconsin was adopted in 1848, and like our present Constitution of 1870, prohibits the Legislature from granting charters of incorporation, but providing for their organization under general laws. In 1853–4, the Legislature of that State passed an Act for the organization of railroad corporations, and providing in that Act that all railroad companies organized under it should pay to the State a stipulated per cent. per annum, which should be in lieu of all taxation. By Art. 8, section 1, of the Constitution—"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe." Railroad corporations having been organized under the Act of 1853–4, and having acquired property, the question arose whether they had the right to avail themselves of the provision of the Act under which they were organized, or whether they were liable to be assessed under the rule of equality and uniformity as prescribed by the Constitution. A case arose and was decided by the Supreme Court of the State, composed of the judges who were on the bench when the Constitution went into operation. That Court was so clearly of the opinion that the Act of 1853–4 was constitutional, that the judges did not deem the question of sufficient importance to write an opinion, but the case, with the arguments of counsel and the conclusions of the court, can be seen in a note to the case of Knowlton vs. the Supervisors, in 9 Wisconsin, p. 410. The next case which arose is that reported in 9 Wisconsin, above referred to, and was decided by a court composed of different judges. It involved simply the question of uniformity—had no element of contract in it—but inasmuch as the unreported case, which did involve a contract like that involved in the Ohio State Bank and branches, so often before the Supreme Court of the United States, was relied upon, Chief Justice Dixon delivered an elaborate opinion, holding that the Constitution of Wisconsin fixed an unbending rule of uniformity, and that the Legislature had no power to prescribe any other. The decision of the case before the Court was clearly right—the discussion of the former case was wholly unnecessary. Then followed the

cases of Sanderson vs. Cross, 10 Wis., 282, and Attorney General vs. Plank Road Company, 11 Wis., 42, adhering to the case of Knowlton vs. the Supervisors, in 9 Wis., and then comes the case of Gilman vs. the City of Sheboygan, 2 Black, 510, following and approving the Wisconsin cases; but the Supreme Court of the United States is careful to say that it involved no contract. The Court, on p. 513, expressly repudiates the idea of a contract, as averred in the amended bill, and further holds that if such a contract did exist, it did not belong to Gilman vicariously to enforce it. Notwithstanding the strong language used by the Supreme Court of Wisconsin in the 9th, 10th and 11th cases referred to, they by no means settled the question against the railroad corporations under the act of their organization, and they still insisted on paying their taxes under that act, and to insist upon its provisions as exempting their property from further taxation, and the question again came before the Supreme Court of that State, in the case of Kneeland vs. Milwaukee, reported in 15 Wisconsin, 454. Chief Justice Dixon and Mr. Justice Payne delivered elaborate opinions, adhering to their former conclusions, and again overruling the unreported case referred to, which may be found in 9 Wis. After these opinions were delivered, upon a re-argument the Court withdrew the opinions and gave its judgment in accordance with the original case, basing their decision, however, upon the grounds of public policy and *stare decisis*. And so the construction placed upon the Act of 1853–4 by the old Court is now the law of Wisconsin, and the first case is expressly followed in Brightman's case, 22 Wis., p. 58. It is perfectly clear that the Wisconsin Court brought a great deal of trouble upon itself by discussing in the 9 Wis. case a question which the record did not raise, and in the decision of which the Court does not at all refer to the decisions of the Supreme Court of the United States, or to those of the various State Courts, upon the same question. And from the case of the State *ex rel* Reedsburg Bank vs. Hastings, 12 Wis., p. 47, it can be shown that the unbending rule of uniformity and equality, which the Court so frequently says is fixed by the Constitution, is only applicable to ordi-

nary, general, or special assessments, and is not at all applicable to taxes fixed by the Legislature in contracts made pursuant to other provisions of the Constitution; and in that case it was accordingly held, under the provisions of the banking law, which provided that any banks organized under its provisions should pay to the State a semi-annual tax of three-fourths of one per cent. on its capital, and that it should be exempt from any other taxes, that the bank could not be further taxed.

Another mistake of the Wisconsin Court was in supposing, as it evidently did, that section 1 of Art. 8, as above quoted, introduced something new; whereas, that section is merely declaratory of the common law, just as the rule of equality and uniformity, as prescribed in our Constitution of 1834, is declaratory of the common law. Doubtless the people in framing and adopting a Constitution may prescribe an arbitrary rule of taxation, violating the principle of equality and uniformity, but if they prescribe no rule, the common law declares the rule with the absolute force of a constitutional provision; and neither the courts nor the people will permit the Legislature to violate it.

And Mr. Cooley, on p. 516, discussing the Wisconsin cases relating to the rule of equality and uniformity, says: "It is to be observed of these cases, however, that they would have fallen within the general principle laid down in Knowlton vs. Supervisors of Rock County, 9 Wis., 410, and the legislative acts under consideration might perhaps have been declared void on general principles, irrespective of the peculiar wording of the Constitution." And Kent says, vol. 2, Mar. 331: "Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of the government. It is not sufficient that no tax or imposition can be imposed upon the citizen but by their representatives in the Legislature. The citizens are entitled to require that the Legislature itself should cause all public taxation to be fair and equal in proportion to value of property, so that no

one class of individuals, and no one species of property, may be unequally or unduly assessed." But this rule has no application in restraining the power of the Legislature to commute a tax or exempt property from taxation, for a consideration. And so far as we have been able to ascertain, the Supreme Court of Wisconsin is the only Court that has attempted so to apply the rule; while the Supreme Courts of Illinois, Indiana and Arkansas expressly, forcibly and, we think, conclusively recognize the distinction. Thus section 2 of Art. 9 of the Constitution of Illinois provides that "the General Assembly shall provide for levying a tax by valuation, so that every person and *corporation* shall pay a tax in proportion to the value of his or her property." Under this provision the Supreme Court of Illinois has repeatedly held that in making assessments for taxation the rule of uniformity and equality must be preserved, and has repeatedly recognized and held that the Legislature had the power to commute for a tax, or to contract for its release for a consideration.

12 Ill., 138;
25 Ill., 561;
30 Ill., 146;
And particularly 4 Scam., 304.
31 Ill., 484.

The Constitution of Arkansas, relating to taxation, is almost identical with our own, providing "that all property subject to taxation should be taxed according to its value, that value to be ascertained in such manner as the General Assembly should direct, making the same equal and uniform throughout the State;" so "that no one species of property, from which a tax might be collected, should be taxed higher than another species of property of equal value." Under the Constitution, in the case of Pike vs. the State, 5 Ark., p. 204, the Court held that an act of the Legislature which violated this rule was void. But in the case of the State vs. Crittenden county, 19 Ark., 369, the Court approving the decision in 5 Ark.,

decided that the Legislature had the power to exempt certain lands from taxation for a consideration. So also the Constitution of Indiana provides that taxes shall be equal and uniform, that Constitution also, like ours, authorizing the Legislature to grant charters of incorporation; and in the case of the Bank vs. City of New Albany, 11 Ind., 150, the Court said: "The unqualified grant, then, of power in a Constitution to a Legislature to charter a bank, carries with it the power to fix the conditions upon and under which the corporation shall exist and act, one of which conditions may be an enlargement or curtailment of the right to tax it, as compared with other objects of taxation. And see Bank vs. Madison, 3 Ind., 43.

In Jefferson Bank vs. Skelly, 1 Black, 436, the Supreme Court of the United States expressly says that the legislative power to make these charter contracts exists, unless expressly inhibited by the State Constitution. Under the proviso to the 7th section of Art. 11, we insist that the power is affirmatively conferred instead of being inhibited.

Upon the subject of taxation the provisions of the Constitutions of Michigan, Illinois, Tennessee, Louisiana, California, Wisconsin, Texas, Arkansas, Mississippi and Massachusetts may be found in Sedgwick on Statutory and Constitutional Law, pp. 555, 556, 558, from which it will be seen that in many of the States in which the distinction between the application of the rule of uniformity and the power of the Legislature to commute for a tax, or exempt altogether, is broadly recognized, the provisions of the Constitution are quite as definite as ours of 1834.

On p. 558, Mr. Sedgwick says: "Many interesting cases have arisen on the subject of exemption from taxation. It has been decided that where exemption from taxation is made a condition for a grant, it is in the nature of a contract, the grant and its conditions are equally inviolable."

Redfield, in his work on railways, and in the supplement published in 1870, on p. 508, says that this doctrine is "now well settled."

So Angell and Ames on Corporations, p. 476, Section 476, say: "Thus it appears beyond dispute, that not only the property but the franchise of a corporation may be exempted from taxation by an express contract."

In the case of the State of Arkansas vs. the County of Crittenden, 19 Ark., 360, one of the most thorough cases which the Court will find upon the subject, and arising under a Constitution almost in the exact words of ours upon the subject of taxation, the Court says: "It has been repeatedly held by the highest authorities, both State and Federal, and is now settled beyond controversy, that contracts made by a State, exempting property from the imposition of taxes, are valid and binding." Page 372. And in McGehee vs. Mathews, 4 Wal., 143, the Supreme Court of the United States reversed the Supreme Court of Arkansas upon this identical question, in a case which arose long subsequent to the case in 19 Arkansas.

In the Bank of Cape Fear vs. Fleming, 7 Iredell's Law, p. 55, the Supreme Court of North Carolina, affirming the Bank vs. Edwards, 5 Iredell's Law, 516, exempting the property of the bank, says: "Acts of this kind are nearly coeval with our Government and have been sustained in our courts, and yet they withdraw from taxation much valuable property, and thereby increase the burden of those whose property is not exempt. P. 61. And see

Attorney General vs. Bank of Charlotte, 4 Jones Eq., 292;
So in Ill., 4 Scam., 304;
30 Ill., 148;
And so in Ala., Doughrill vs. Ins. and Trust Co., 31 Ala. N.S. 91;
And Ga., see 26 Ga. R., 651.

But we insist that the proviso to the 7th section of Art. 11 expressly confers the power upon the Legislature to grant charters of incorporation with exemptions.

The 7th section of the 11th Art. of the Constitution expresses three prohibitions or restrictions on the power of the Legislature:

First. It shall have no power to suspend any general law for the benefit of any particular individual.

Second. Nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land.

Third. Nor to pass any law granting to individuals or any individual, *rights, privileges, immunities,* or *exemptions,* other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law. *Provided, always, the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good.*

The first obvious remark to be made on this section is, that here the power to grant charters of incorporation is introduced as a proviso, or exemption to a prohibition on the Legislature against suspending any general law, or passing any law for, or granting any peculiar rights, privileges, immunities, or exemptions, to any individual or individuals. It certainly was not to vest the Legislature with the simple power of granting charters of incorporation, with the ordinary powers and privileges of such corporations, for that the Legislature could do without any such proviso.

Then the proviso must have been inserted to except from these restrictions the power of the Legislature to grant charters of incorporation that would suspend general laws, or grant to incorporations peculiar *rights, powers, privileges, immunities,* and *exemptions,* which were embraced in the prohibitions, and but for the proviso could not be granted.

The framers of the Constitution, when they inserted this proviso, had in their minds, as familiar knowledge, the peculiar privileges, rights, immunities and exemptions intended to be reserved as to the corporations from the effect of the pro-

hibition. How are we to ascertain what rights, privileges, immunities and exemptions they intended to so reserve? By examining the charters which had been granted by the Legislatures of North Carolina, while Tennessee formed a part of it, and those granted by the Legislature of Tennessee from the time it became a State, up to 1834. On examining them, we find that the only exemptions granted in any of those charters were exemptions from taxation; and that these exemptions had been inserted in nearly, if not quite, all the charters that had been granted to banks or internal improvement corporations during the history of the State, from the granting of the charter of the Great Dismal Swamp Canal Company, in 1784, by the State of North Carolina, down to the Legislature of 1832–3.

There were no less than four banks in existence when the Constitution of 1834 was framed and adopted, all with charters granted by the Legislature of Tennessee, and containing exemptions from taxation.

Act of 1823, ch. 7, p. 9, sec. 1, exempting from taxation land of any worshiping society.

Act of Oct. 18, 1824, ch. 141, p. 134, section 1, exempts from taxation the Paint Mountain Turnpike Road.

Another Act exempts iron and salt from all taxes.

Another Act exempts groceries sold by farmers.

Another Act exempted all inundated lands from taxation.

These might be greatly multiplied, but a sufficient number have been referred to to show that the word "exemption" had a definite, known, legal meaning, and meant exemption from taxation; and was so used by the framers of the Constitution.

Then the argument stands thus: In the history of Tennessee, while forming a part of North Carolina, and after becoming an independent State, repeatedly corporations had been created by the Legislature with exemptions from taxa-

tion granted in the charters; the word "exemption" had a great many times, and, indeed, invariably, been used to express release from taxation; the framers of the Constitution of 1834 had inserted section 7, prohibiting the Legislature in future from granting "exemptions" to any individual or individuals not granted to all others, but they excepted from the control of this prohibition, the power of the Legislature to confer such exemptions on corporations, when chartered; it follows, therefore, that the Legislature have power to grant exemptions from taxation of their property, to corporations, as a part of their charter contracts.

But it has been said that our argument or position, that the proviso to the 7th section of the 11th Article of the Constitution vests the Legislature with power to grant charters of incorporation with exemptions from taxation as to their property, proves too much; that if the Legislature can grant such exemptions, notwithstanding the rules of uniformity and equality and *ad valorem*, of the 28th section of the 2d Article, then it can grant lottery privileges, and also privileges in violation of the usury laws.

This argument is wholly untenable, as will be seen at a glance. The policy and intention of the framers of the Constitution touching lotteries and usury, was, that neither should be practiced in the State. The provisions touching them are found in the 5th and 6th sections of the 11th Article of the Constitution, at page 49 of the Code: "The Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prevent the sale of lottery tickets in the State. The Legislature shall fix the rate of interest; and the rate as fixed shall be equal and uniform throughout the State."

Let us first consider the clause as to lotteries: the language of this 5th section manifestly and plainly is mandatory, and looks to the *total exclusion from the State* of lotteries and lottery tickets and dealings. To permit the Legislature, under the proviso to the 7th section, to grant lottery privileges to any

corporation, would totally defeat the policy of exclusion. One lottery office would as effectually defeat total exclusion as a thousand. Therefore, to give the proviso to the 7th section a construction that would permit the Legislature to abrogate the 5th section against lotteries and usury, would be to allow a proviso to destroy and annul a solemn, plainly and precisely expressed provision of the Constitution; and that, too, when it was not a proviso or exception in favor of any corporation, and would defeat the entire policy of making the interest laws uniform. Thus, to permit exceptions to either of these clauses, would abrogate the clause.

Not so, however, as to taxes; exemptions of corporation property would be limited to that property, and would not affect the rule as applicable to all other property in the State. But the Constitution itself declares the wisdom of the policy of exemptions in one of its own provisions, wherever it is to foster a branch of industry in the State. The 30th section of the 2d Article at page 39 provides, "that no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees." Now here the framers of the Constitution say, "to foster the manufacture of the produce of the State is so important to the industrial interests of the State, that we will not leave it to the discretion of the Legislature, but will permanently exempt it now." This exemption may be fairly taken as a declaration by the framers of the Constitution, that they had not made any unbending rule of non-exemption; otherwise, why violate it themselves? And it may fairly be construed as an intimation to future Legislatures that it would be wise to make exemptions whenever they deemed it expedient for the public good.

If the 10th section of the charter of the Union and Planters Bank is a valid contract, what is the proper construction to be put upon the words of that section? "That said company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, *which shall be in lieu of all other taxes.*" The same general rules

which govern the construction of deeds, wills and grants, also govern the construction of statutes.

Potter's Dwarris, 175 to 179;
State vs. Turnpike Co., 2 Sneed, p. 88.

And it is insisted that the intention of the parties to this contract plainly appears to be, that the corporators on the one hand, agree to pay, and that the State, on the other hand, agrees to receive one-half of one per cent. on each share of the capital stock subscribed, as a *consideration* for the exemption of the franchise, capital stock and shares from all taxation.

A simple solution of this question lies in two propositions:

1. Whenever a State exacts a consideration for a charter, that *consideration* absolutely limits and controls the authority of the State over the contract; it can neither add to, change or modify the terms, by taxation or otherwise. This was the point decided in the Union Bank vs. the State, in 9 Yerger, and at April term, 1872, in the City of Memphis vs. Hernando Insurance Company, and by the express language of Judge Turley in 9 Yerger, this consideration is not limited to a mere price paid for the franchise, but "includes the right to use the capital stock for all legitimate banking purposes."

2. Whenever words have been added to the consideration stipulated for in the charter, indicating that the price paid should be in full for all taxes, these words have been invariably held to exempt the entire corporate property, including the franchise, capital stock and shares, from taxation, whenever the Supreme Court of the United States has had occasion to construe them. And this principle is now established in the text-books.

Redfield's Supplement, pp. 508, 557.

In Gordon vs. Appeal Tax Court, 3 Howard, 133, the words were, "Not to impose any further tax or burden," and

were held to exempt the stockholders. Approved in Piqua Bank, 16 How., 369; Dodge vs. Woolsey, 18 do., 331; Jefferson Bank vs. Skelley, 1 Black, 439; People vs. Commis., 4 Waller, 244; Lionberger vs. Rouse, 9 do., 468. In this last case the words necessary to be construed were, "in full of all bonus and taxes to the State," "which should be in full compensation for all taxes of every kind whatsoever," and the Court said: "Having contracted with these banks to accept from them annually one per cent. in lieu of all taxes, on their paid in capital stock, it cannot turn around and assess a tax on the shareholders." Page 477.

The first case to be found reported in the United States is in 2 Harrison, N. J., p. 80, decided in 1830, State vs. Berry; the words were, "and that no further or other tax or impost shall be levied or assessed upon said company." Held to exempt "both the company and its property from any other tax, except as therein stated."

The Supreme Court of New Jersey has constantly held that these and similar words exempted the company, its property and stockholders from any other tax than the one stated in the charter.

3 Harrison. 11 do., 71;
1 N. J., 527;
3 Zabriskie, 484 do., 502, 4 do., 370, do. 401.

In this last case, State vs. Powers, 4 Zabriskie, the exemption included the stockholder Colt, and the Court said, "The stock held by the prosecutor is not liable to taxation." See page 402.

In the charter of the Bank of Cape Fear the words were, "that the said bank shall not be liable to any further tax." Held to exempt its property from all taxes, State, county and town.

Bank of Cape Fear vs. Edwards, 5 Ired., 156;
Same vs. Dewing, 7 Ired., 55.

In the charter of the City Bank of New Haven the words were, "the capital stock of said bank shall be and remain free from taxation." Held to exempt the real estate owned by the bank, and used for banking purposes.

New Haven vs. the City Bank, 31 Conn., p. 100.

In the charter of the Northern Bank of Kentucky the words were, "which shall be in full of all tax or bonus." Held to exempt the stockholder.

Johnson vs. the Commonwealth, 7 Dana, 338, Marg. 216.

By Art. 1, section 10 of the Constitution of the United States, this is a Federal question.

And whether arising in the Federal Court or in the State Court, it is to be ultimately decided by the Supreme Court of the United States. If it arise in the State Court it goes to the Supreme Court of the United States, under and by virtue of the 25th section of the Judiciary Act of 1789.

In the decision of this question the Supreme Court of the United States is not bound by the decisions of the State Courts. Dodge vs. Woolsey, in 18 How., goes fully into the question, and it is there shown to be the duty of that Court to determine the question itself, as indeed it has always done from New Jersey vs. Wilson, in 7 Cranch, down to the present term of the Supreme Court, in the case of Humphreys vs. Peagues, from the Supreme Court of South Carolina, 16 Wall., p. 244, in which Mr. Justice Hunt, delivering the opinion of the Supreme Court, says: "Another question is raised, to-wit: That a Legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign State; that its exercise is a political necessity, without which the State must cease to exist, and that it is not competent for one Legislature, by binding its successors, to compass the death of the State. *It is too late to raise this question in this Court.* It has been held that the

Legislature has the power to bind the State in relinquishing its power to tax a corporation. 1 Black, 436. It has been held that such a provision in the charter of an incorporation constitutes a contract that may not be subsequently impaired. 4 Peters, 514; 4 Wheat., 518; 3 Wal., 51. These doctrines have been reiterated and reaffirmed so recently as the year 1871, in an opinion delivered by Mr. Justice Davis, in the case of the Wilmington Railroad vs. Reid, 13 Wal., 264: 'THEY MUST BE CONSIDERED AS SETTLED IN THIS COURT.'"

The reiteration and reaffirmation by a State Supreme Court of its own construction upon this question has no weight with, or effect upon the Supreme Court of the United States. The Supreme Court of the United States does not always reverse the State Supreme Court upon these questions. It very frequently construes the contract, or that there is no contract, just as the State Court does; as may be seen in Christ Church Hospital, 24 How., 300, from the Supreme Court of Pennsylvania, and in Milligan vs. Corbin, in 7 Wallace, 487, from the Supreme Court of Kentucky. These decisions are not based upon the judgment of the State Court, but are independent of it.

Dodge vs. Woolsey arose in the Circuit Court of the United States, but the opinion delivered in that case reversed the two cases immediately following, which arose in the State Court, and had been decided in favor of the tax law of Ohio by the State Court. In Jefferson Bank vs. Skelley, 1 Black, 436, it was argued by the counsel for the State of Ohio, that the Supreme Court of the United States was bound by and ought to follow the decisions of the State Court, because the judgment of the Supreme Court of the United States, in the Piqua Bank case, 16 How., 369, involved the construction of the Constitution and laws of the State of Ohio, differently from what both had been decided to be by the Supreme Court of the State, and that the Supreme Court should follow or conform to the conclusions of the former. See the answer to that on page 443. "*This is the single exception.*"

Here that question cannot arise, because this Court has never decided this question. In the Union Bank vs. the State, 9 Yerger, the contest was not between the stockholders and the State, but between the bank and the State, and that upon a charter materially different from the one under consideration. There were no super-added words; no "in lieu of all other taxes," in the charter of the Union Bank.

Indeed upon this question the Supreme Court of this State looks to the adjudications of the Supreme Court of the United States with as much propriety as it looks to the adjudications of its own, upon ordinary questions, and for the same reason. They are authoritative. Sheldon vs. the City of Chicago, 9 Wallace, 50, is a valuable case upon this point. From that case it appears that the Supreme Court of Illinois had construed the contract between the city and the railroad company by a decision *inter alios*, and by that construction had imposed the duty of *paving* the streets upon the railroad company. In the case in 9 Wallace, the Supreme Court of the United States refused to follow the Court of Illinois, but construed the contract for itself, and construed it differently, and held that the company was only bound to *repair* the streets. The Supreme Court laid more stress upon the construction placed upon the contract by the parties, than it did upon the decision of the Supreme Court of Illinois.

But it would seem that if there were any case in which the Supreme Court of the United States would feel bound by the decision of a State Court, it would have been in our own State, in the case of Furman vs. Nichol, which went up from 2 Col., 432, and is reported in 8 Wallace, 49, reversing the Supreme Court of Tennessee upon the construction of a contract which was collateral to the statute. Without reviewing the cases further, I refer to the following:

Wilson vs. N. J., 7 Cranch, 164;
Fletcher vs. Peck, 6 Cranch, 136;
Gordon vs. Appeal Tax Court, 3 How., 131;
Piqua Branch Bank vs. Knoop, 16 How., 369;

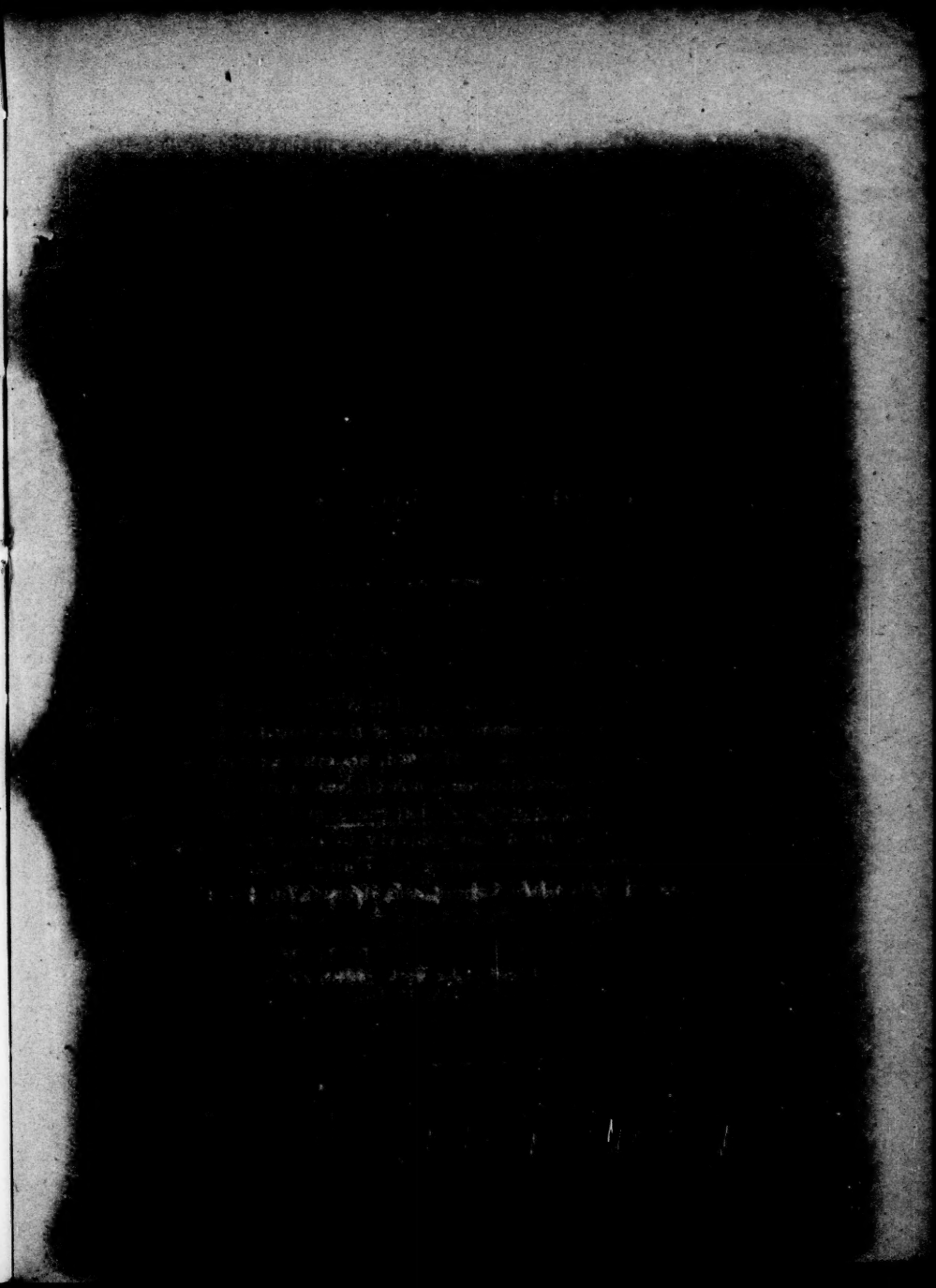
Dodge vs. Woolsey, 18 How., 331, and the two following cases in that book;
Jefferson Bank vs. Skelly, 1 Black, 436;
Bank of Commerce vs. Coms., 2 Black, 620;
Van Allen vs. Assessor, 3 Wallace, 574;
McGee vs. Mathis, 4 Wallace, 244;
Furman vs. Nichol, 8 Wallace, 49;
Railroad, 13 Wallace, 264; and next case,
White vs. Hart, 13 Wallace, 646;
Humphreys vs. Peagues, 16 Wallace, 244;

All of which hold that when the question to be determined by the Court is: Does the legislation in question impair the obligation of a contract? the Supreme Court of the United States construes the State Constitution, the charter contract, and the legislative act which is said to impair that contract, for itself, and it is not bound by the decision of the State Supreme Court.

The distinction is to be found in Williamson's case, 24 Howard, where the Supreme Court of the United States reversed its own decisions in 8 Howard, in order to conform to the decisions of the Supreme Court of New York, involving the construction of statutes of that State, and by their construction fixing a rule of real property in that State. This case was in the Supreme Court of the United States for the last time in 7 Wallace, where the decision in 24 Howard is adhered to.

L. D. McKISICK,

For Shareholders in Union and Planters Bank.



—IN THE—

Supreme Court of the United States

WM. M. FARRINGTON, Plaintiff in Error,

—vs.—

THE STATE OF TENNESSEE and COUNTY OF SHELBY.

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BRIEF OF S. P. WALKER,

OF COUNSEL FOR DEFENDANTS IN ERROR.

—IN THE—

Supreme Court of the United States

WM. M. FARRINGTON, Plaintiff in Error,

—vs.—

THE STATE OF TENNESSEE and COUNTY OF SHELBY.

The Union and Planters Bank of Memphis is a banking corporation organized under a charter passed and amended March 20, 1858, and February 12, 1859.

One clause of its charter provides that "said company shall "pay to the State an annual tax of one-half of one per cent. "on each share of the capital stock subscribed, which shall "be in lieu of all other taxes."

By an Act of the Tennessee Legislature of 1869–70, chap. 81, sec. 1, it was provided: "All *shares of stock* in any bank, "institution or company, now or hereafter incorporated by "or in pursuance of any law of this State or any other State, "shall be valued and assessed, and subject to taxation."

Farrington is the owner of one hundred and fifty shares of the stock of said company, upon which the State and County under the Act aforesaid have undertaken to impose the same

rate of taxation that is imposed upon other taxable property; he resists the tax upon the ground that, by the above quoted clause of the charter, the bank, its franchises, and capital stock, and also the shares of stock in the hands of the stockholder, are exempt from taxation, other than the specific sum nominated in the charter, and admitted to have been paid by the Bank.

The question is, whether the charter stipulation that the company should pay an annual rate upon the stock subscribed "in lieu of all other taxes" exempts the stockholder from taxation of the shares of stock in his hands, as an individual. It is scarcely necessary to say that the charter grant will be construed most favorably to the State, that nothing passes except what appears to be plainly and manifestly within the legislative intent, and that this is particularly so when the question is of the surrender of the sovereign power of taxation.

Providence Bank vs. Billings, 4 Pet., 514;
The Charles River Bridge vs. The Warren Bridge, 11 Pet., 420;
Richmond R. R. Co. vs. Louisa R. R. Co., 13 How., 71;
Ohio Life Ins. Co. vs. Debolt, 16 How., 416;
Jefferson &c. Bank vs. Skelly, 1 Black, 436.

For the purposes of the argument, I shall assume that the charter clause means "in lieu of all other taxes" upon the company, its franchises or capital stock. Does the exemption of the capital stock by plain and manifest implication extend to the shares of stock in the hands of the stockholder?

It will not be denied that the correct solution of this question depends upon our arriving truly at *the intent of the Legislature*—that the plaintiff in error must convince the Court that the plain and unmistakable intent of the clause in question was not only to exempt the franchises and capital stock of the company, but also the shares of stock in his hands.

It will not be denied that the Legislature might, in express terms, have exempted the capital stock, and reserved the right

to tax the shares; that there would have been nothing incongruous or anomalous in such an exemption or reservation.

The question then being as to the intent of the Legislature, let us examine, as of primary importance, on that question, the case of *The Union Bank vs. The State, 9 Yerger, 490.* The tax there in question was upon the shares of stock in the Union Bank. The Bank charter provided that the company should pay to the State annually "one-half of one per cent. on the amount of capital stock paid in by the stockholders."

It was held:

1. That the agreed annual payment of one-half of one per cent. was the price of the franchise, and forbid any other tax thereon.

2. That *the capital stock was exempt by implication from the exemption of the franchise.*

3. That *the shares of stock were not exempt,* the exemption by implication not extending to them.

4. That the tax there in question could not be enforced against resident owners of the shares, because they were assessed at cost, not according to value, as required by the Constitution; nor against non-resident owners, even if properly assessed.

I state the case thus particularly, not so much to call attention to it as an adjudication of the questions here at issue, but to note its important bearing upon the question of the legislative intent. The case was decided in the year 1836, and *stood unquestioned during all the period of the passage of the several charters* of the Union and Planters Bank, and the other companies whose cases are now submitted.

Nothing is better settled or more familiar than that, upon the re-enactment of a statute which has received a judicial construction, the construction is taken to be as much a part of the statute as if it had been therein embodied.

Myrick vs. Hasey, 27 Maine, 9–17;
Rutland vs. Mendon, 1 Pick., 154.

"In enacting statutes, the Legislature will be presumed to "have legislated with reference to the construction given to "former statutes conceived in substantially the same lan- "guage."

State vs. Swope, 7 Indiana, 91;
Anthony vs. The State, 29 Ala., 27;
Duvamus vs. Harrison, 26 Ala., 326;
Bank of Mobile vs. Meagher, 33 Ala., 622;
McKenzie vs. The State, 11 Ark., 594;
Commonwealth vs. Hartnett, 3 Gray, 450;
Pennock vs. Dialogue, 2 Pet., 1–18.

"In settling the construction of a new statute, regard should be had to the known and established interpretation of the former" statute, on the same or analogous subject.

Whitcomb vs. Rood, 20 Vt., 49.

Now in the case, *supra*, of the Union Bank vs. The State, the Court held that the specification of the annual rate by implication exempted both the franchise and capital stock from any further exaction, but that the implication did not extend to the shares. When therefore the Legislature granted another charter, *expressly* exempting the franchise and capital stock, we must presume that it did not intend an implied exemption of the shares, inasmuch as the Court had held that an implied exemption of the franchise and capital stock would not extend by implication to the shares. It must be presumed that the Legislature knows the decisions of the highest judicial tribunal of its own State; and it had only to look at this decision to see that it could safely grant to the company, in its franchises and property, an immunity from taxation beyond the specified rate, without such immunity being extended to the shares.

In the view that I now take of it, the correctness of that decision is wholly immaterial; that there was such a decision, unrecalled and unquestioned, is enough for my present purpose. The Legislature had power to grant the charter or not, and to impose just such terms, as it saw fit; its intent alone is here in question; and it had the warrant of the Supreme

Court of the State—the very tribunal to which the question if made, would be again referred—for believing that an immunity from taxation to the company would not extend to the stockholders.

In the case of The Supervisors vs. The United States, 18 Wallace, 71, this Court, in respect to the taxing power of a county in the State of Iowa, came to a conclusion different from that announced in Butz vs. Muscatine, 8 Wall., 575, solely upon the ground that the *warrants had been issued by the county after the question of the taxing power of the county had become fully settled by the decisions of the Supreme Court of the State.* The construction became part of the statute as to all acts done by the county after such construction became settled. The taxing power was part of the contract with the warrant-holder, who was presumed to have taken them with knowledge of the decisions as to the extent of the power. And in the opinion delivered in Butz vs. Muscatine, the Court had said: "if the construction given to the statute by the "State Court had preceded the issuing of the bonds, and had "become the settled law of the State before that time, the "case would have presented a different aspect." So here the Legislature must be presumed to have granted, and the companies to have accepted their charters, with knowledge of the judicial declaration of the extent of the exemption.

We submit, therefore, that the fact of the decision in 9th Yerger, previous to the charter grant, shows affirmatively an intent not to exempt the shares.

But suppose this Court is unwilling to give it quite the weight that I do; is unwilling to say that the existence of that decision shows a positive intent to reserve the power to tax the shares of stock, still it would seem to be impossible to deny that *it throws such doubt upon the question* as to repel the construction claimed for the plaintiff in error.

Every reasonable doubt must be resolved against the plaintiff in error. How is it possible for him to maintain that his claim of immunity is free from all doubt, in the face of

the fact that at the time of his charter-grant the Supreme Court of the State had held against the implication upon which he relies?

It will be said that the Legislature must have meant by the words "in lieu of all other taxes," something more than an exemption of the franchise and capital stock, because the Court in 9th Yerger had implied that exemption from a mere specification of the rate. Our answer is, that the intent was merely to make certain, by express enactment, what had before been left to implication.

Montville vs. Houghton, 7 Conn., 443;
Hughes vs. Farrar, 45 Maine, 72.

That the precaution was a wise one, is now demonstrated, for the Supreme Court has repeatedly overruled the 9th Yerger case, so far as implying an exemption of the capital stock from the specification of a rate is concerned; it is now settled in that Court to imply only an exemption of the franchise from further taxation.

As the case of Gordon vs. the Appeal Tax Court, 3 Howard, 133, must be discussed, I will advert to it here most conveniently, for it seems to me that a conclusive answer to that case is found in the proposition I have submitted. I might concede that Gordon's case would be decisive of this, but for the decision in 9th Yerger, and yet with confidence submit that the existence of the latter decision at the time of the grant of the charter must change the result here. Suppose that prior to the passage of the act of 1821, that came before this Court in Gordon's case, the Supreme Court of that State had considered, and settled the legal effect of similar legislation, can it be doubted that the result in this Court would have been different? Other and amply sufficient answers are made to that case in the opinion of the State Supreme Court, here being reviewed and printed with the Record.

Transcript 6.

Without repeating them, I beg to extract and call attention to one portion of the opinion in Gordon's case. On page 148 it is said: "The act to be done in this instance was relative "to the institution. The Legislature knew it could only be "done by the stockholders, and it uses the word banks in "reference to the act being accepted by the stockholders. "The act was accepted by them. Where then the Legisla- "ture says 'that upon any of the aforesaid *banks* accepting "of and complying with the terms and conditions of this act, "the faith of the State is hereby pledged not to impose any "further tax or burden upon *them* during the continuance of "their charters under this act,' *the relative is as broad as the* "*antecedent*, comprehending all that the latter referred to." The stockholders therefore were held to be comprehended within the exemption clause. It may be said that these corporators in like manner accepted their charters; and in one sense it is true; but it is not true in the sense or in the aspect in which the Court was viewing it in Gordon's case. There the stock was an already existing property, valuable, and the value of which was to be affected by the acceptance or rejection of the proposition submitted by the Legislature to the stockholders; but in the case of an original acceptance of a charter, and the organization of the company under it, the shares of stock come into existence as property, and the charter is accepted, at the same time, and practically by one act; in the one case the stockholder had already invested his capital in the shares of stock, which were to be affected by the legislation proposed, and he was held to have stipulated with reference to his own property; in the other, any individual *becomes a shareholder* upon the terms contained in the charter, and the only question is to arrive at the just meaning of the Legislature in creating the corporation.

Besides the views already advanced, I submit that the very question here at issue has been determined by this Court in the case of People vs. the Commissioners, 4 Wall., 244. Two cases were then presented and determined together. One of them involved the question of taxing shares of stock in the National Banks; the other, shares in the Corn Exchange Bank, incorporated under the laws of the State of New York. In respect to the case of Mead, (the shareholder in the latter bank) the same line of argument was urged upon the Court that is here advanced for the plaintiff. It was urged that the United States securities in which the capital of the Bank was invested were within the provision of the act of Congress, (13th stat. at large, 346) enacting that such securities "whether "held by individuals, corporations or associations, shall be "exempt from taxation by or under State authority," that the capital of the Bank could not be taxed upon any measure or computation of its value which included such securities, (citing Bank of Commerce vs. Commissioners, 2 Black, 620, and the Bank tax case, 2 Wall., 200;) and that a tax incompetent to the State when assessed to the corporation, and upon its capital in bulk, was also incompetent to it when assessed upon the shares of stock. This Court answered the argument by reiterating the proposition announced in Van Allen vs. the Assessors, 3 Wall., 573, that "the tax on the shares is "not a tax on the capital of the Bank," that the interest of the shareholders "is a distinct, independent interest or pro-"perty, held by the shareholder like any other property that "may belong to him, and subject to like taxation." Counsel for plaintiff in error, as does also Judge McFarland, in the dissenting opinion delivered by him in this case, say in answer to the decisions of this Court in respect to taxing shares in the National Banks, that the tax was expressly authorized by Congress, subject only to the limitations imposed by it, and there was properly an end of the matter. But that answer cannot be made to the decision in the 4th Wall., supra, so far as the case of Mead was concerned. As to his case, the single issue presented, was whether an exemption of the capital would by implication exempt the shares of stock, and it was answered in the negative.

Many and most substantial reasons may be presented why an exemption of the company's property should not exempt the shares of stock.

1. Many of the States have customarily laid a tax on the nominal amount of the capital stock, the tax being sustained as a royalty for the charter-grant.

Immunity from such a tax is certainly a substantial benefit.

2. A tax upon the capital stock of a company, whether laid upon its nominal amount, or upon the actual value of the property in which it is invested, is or may be much more burdensome than a tax upon the shares. This is well illustrated by the decisions of this Court in the State Railroad Tax cases, 92 U. S., 575, where it is said (page 605): "It is "therefore obvious that when you have ascertained the cur- "rent cash value of the whole funded debt, and the current "cash value of the entire number of shares, you have by the "action of those who, above all others, can best estimate it, "ascertained the true value of the road, all its property, its "capital stock and its franchises, for these are all represented "by the value of its bonded debt and of the shares of its "capital stock. * * * * Individuals do not escape "taxation on their real and personal property because they "are insolvent. In several of the States many men in effect "pay tax on their lots or lands, and on the mortgage which "covers it and exceeds it in value, and on a large amount of "personal property, while the mortgage debt exceeds in "amount all that they are worth in the world. No State has "ventured to establish the principle of permitting its visible, "tangible property to escape taxation, relying solely on a "tax imposed on the individual, on a basis of his estimated "wealth in excess of his debts."

The aggregate value of the shares represents only the aggregate value of the property of the company over and above its debts. Exempting the property of the company and taxing the shares is therefore not an illusory or unsubstantial benefit, for in so doing the shareholders in the aggregate are taxed only on the net wealth of the corporation, a principle

of taxation that is not extended to any other member of the community.

3. The policy and reasons that would dictate a commutation of the tax on the franchise and specific property of the corporation would not necessarily extend to the shares. The rate prescribed by the charter is on a fixed basis; it may be presumed to have been adopted by the Legislature as a nearly approximate estimate of what a general annual tax upon the franchise and property would amount to. All the elements for such an approximate estimate were before the Legislature. But not so as to the shares. Their actual value might become very greatly above or below the capital subscribed, depending on the good management and success of the corporate business. When therefore, the Legislature commuted the tax on capital stock, which afforded fixed and invariable elements of admeasurement, it cannot be said that they thereby meant to commute the tax on other and different property which must be taxed according to value, and the value of which fluctuating from year to year, would not admit an *a priori* computation.

4. Not attempting to deny that the value of the shares may be, and doubtless is directly affected by the power of the State to tax the property of the company, it is neither to be denied that the shareholder gets the benefit of having the rate of taxation upon the company fixed by the charter. He gets it by the fact, as I have already shown, that the tax is laid only on the net wealth of the company. He gets it also by the appreciated value of the shares, resulting from the fact that the rate of tax on the company is fixed. Nothing more directly and certainly affects the value of property than burdensome taxation; nothing would more certainly enhance the value of the company's property, *and of the shares*, than an immunity to the company from taxation. Full force and effect is given to the charter stipulation by this enhanced value of the property, and of the shares, without indulging the presumption that the Legislature intended to exempt the shareholders.

The corporations before the Court are strictly private; the public has and can have no interest in them. They can invoke no relaxation of the rule of strict construction upon any supposed desire of the Legislature to encourage and induce the investment of capital in them, as was done in the case of the Baltimore & Ohio Railroad Company, 6 Gill, 288. The Legislature undeniably may exempt the company and tax the shareholders; and as a tax upon the one is substantially different in its mode and results from a tax on the other, exemption of one cannot be extended by implication to the other.

S. P. WALKER,
Counsel for Defendants in Error.

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SUPREME COURT OF TENNESSEE.

KNOXVILLE, SEPTEMBER TERM, 1877.

THE KNOXVILLE AND OHIO RAILROAD COMPANY
vs.
JOHN H. HICKS.

OPINION.

The plaintiff, a corporation, is the owner of a railroad extending from Knoxville to Careyville, in this state. It paid to the collector of Anderson county the taxes assessed against it under protest and brought this action to recover the amount back, claiming that the road and its appurtenances are exempt from taxation. The facts are presented by an agreed case. The railroad in question was constructed and owned by a corporation chartered by the legislature of this state, under the style of The Knoxville and Kentucky Railroad Company. By an act passed 25th of February, 1856, which became part of its charter, the capital stock and dividends, road and fixtures were exempted from taxation until the stock paid a dividend equal to the legal rate of interest. There can be no question but that the exemption was granted in express terms. The company had borrowed from the state a large number of its bonds under the general internal-improvement act of 1851–2, and having failed to pay the interest upon these bonds, proceedings were instituted in the chancery court at Nashville, under acts of the legislature passed for the purpose, for the sale of this and other delinquent roads to enfore the state's lien. The sale was made and confirmed—certain individuals being the purchasers. They afterwards organized under the general laws passed since the adoption of the new constitution, as a corporation under the style of The Knoxville and Ohio Railroad Company (the present plaintiff), for the purpose of becoming the owner of the road, with its franchises; and by a decree of the court at Nashville, title was vested accordingly.

Two important questions have been presented and ably argued: 1st, Whether the legislature had the power, under the constitution of 1834, then in force, to grant the exemption in question; and, 2d, If the exemption was valid in favor of the original company, does that exemption still exist in favor of the present plaintiff as purchaser?

It has been settled, since the Dartmouth College Case, that the charter of a private corporation, when accepted, becomes a contract which cannot afterwards be impaired by legislative action when the power to do so is not reserved. Stipulations for exemption from taxation or the payment of a bonus in lieu of taxation are import-

ant elements of the contract, and are protected by section 10 of article I. of the Constitution of the United States, and a similar provision in the constitution of the state. That the legislature of a state has the power to bind the state by such contracts, where that power is not denied by the constitution, is also a result of these authorities.

As often as this question came before the Supreme Court of the United States, it was earnestly resisted, upon the ground that to permit one legislature to barter away the state's inherent right of taxation so as to bind successive legislatures, is subversive of the government itself, and allows the burthens of taxation which should fall upon all alike to be shifted from the property of wealthy corporations to the shoulders of the remaining tax-payers. If this was a new question, it would deserve the most serious consideration, and courts would now doubtless hesitate long before establishing it, still it is too well established to be at once overthrown, and so the counsel for the state concede.—(See Gordon vs. Appeal Tax Court, 3 Howard; 4 Wheaton, 518; 4 Peters, 514; 1 Black, 436; 3 Wallace, 264; 7 Cranch, 164.)

But these authorities all go upon the assumption that there is no constitutional restriction upon the power of the legislature to grant charters of the character in question. If this provision of the charter granting the exemption be in violation of the constitution of the state, it would not be protected. Did the constitution of 1834 of this state, in force at the time, restrict the power of the legislature in this regard?

It must be borne in mind that in determining what power the legislature of a state may rightfully exercise, the constitution of the state is not to be regarded as a grant of power. The legislature possesses inherently all legislative power, and the constitution is to be construed as limiting or restricting, but not as granting the power.

The first question then is, does the power to grant charters of incorporation, with exemptions from taxation or other like stipulations, binding upon the state, so that the charter after acceptance becomes a contract and irrepealable, fall properly under the head of legislative power? That such power properly belongs to the legislative department of a state, when there is no special limitation of the power, is too well settled to be questioned. The decisions of the Supreme Court of the United States are numerous and uniform, beginning with the Dartmouth College case, and coming down to the present time.—(Pacific R. R. vs. McGuire, 20 Wal.; Wilmington R. R. vs. Reed, Shff., 13 Wallace; Humphrey vs. Pegues, 16 Wallace; 1 Black, 436.) It being, therefore, properly legislative power it exists inherently, and we must look to the constitution to see if any limit or restriction is placed upon the power of the legislature in this regard.

And to understand properly the language of the constitution of 1834 on this subject, we must bear in mind the terms of the pre-

vious constitution. The powers that had been exercised thereunder—the changes made and the evils to be remedied, at the same time considering the different parts of the constitution bearing upon the question. The constitution of 1796, was especially defective in regard to securing equality of taxation, or the taxation of property according to its value. And this was the evil intended to be remedied by the change made and embodied in section 28 of art. 2, in regard to the taxation of property according to its value, and securing the equality of taxation. But is there anything in the first clause of this section intended to limit the power of the legislature to grant exemptions from taxation in charters of incorporation, or (which is the same) to stipulate for a bonus or fixed sum in lieu of taxation. The language is, "All lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, &c., and such other property as the legislature may from time to time deem expedient, *shall be taxable.*" Was this intended to mean that thereafter the legislature should not have the power to stipulate for total or partial exemptions from taxation in charters of incorporation. The convention of 1834 comprised among its delegates some of the ablest lawyers the state has ever produced. That they were familiar with the principles of the Dartmouth College case, decided some fifteen years previously, and followed in other cases, cannot be doubted. It is apparent also that they were familiar with the fact that the legislature, under the previous constitution, had exercised the power of granting charters with total or partial exemption, or contracting for a special bonus in lieu of taxation, notably in the instance of the charter of the Union Bank, granted only two years before (Union Bank vs. The State, 9 Yer., 490), and that the power had never been questioned. With these facts prominently before the convention, if it was their purpose to restrict the power of the legislature, we should expect to find such restriction expressed in unequivocal language. But the only direct provision in regard to the power of the legislature in respect to charters of incorporation is in the proviso to section 7 of art. 11, to the effect that the restriction upon the power of the legislature to grant special privileges, immunities, and exemptions was not to be construed to affect the power of the legislature to grant such charters of incorporation as they might deem expedient for the public good, thereby leaving the power as it previously existed.—(See Hope vs. Deaderick, 8 Hum., page 1.) If it had been the purpose of the convention to restrict the power of the legislature in this particular, this would certainly have been the appropriate place to insert the restriction, but so far from doing so, we find only the proviso above referred to, which was intended only to exclude the idea that the first clause of the section against the granting of special privileges, immunities, or exemptions was intended to limit the power of the legislature in regard to granting charters of incorporation.

From this the conclusion seems necessarily to follow that the legislature was still left the power to pass laws creating bodies cor-

porate, with all the rights, privileges, immunities, and exemptions which it was usual to vest in such fictitious persons, under the general principle of law, previously recognized, and, as we have seen, the power in question was previously recognized by the general law and the authorities of this state. We do not say that rights, privileges, or immunities might be granted inconsistent with other positive restrictions of the constitution, and this brings us again to the language of section 28 of article 2, to wit: "All lands liable to taxation, held by deed, grant, or entry; town lots, bank stock, &c., and such other property as the legislature may from time to time deem expedient, *shall be taxable.*"

It has never been contended that this made it imperative upon the legislature to tax all property. That body might tax or omit to tax; that is, for the time exempt. If a tax was imposed it was required to be upon the value of the property and according to the rules of equality. This is made more apparent by the change made by the constitution of 1870, which declares that all property, real, personal, and mixed, *shall be taxed*, subject to the right of the legislature to exempt in certain cases which are specifically defined. It is argued that the above clause makes all the property mentioned, and such other as the legislature might deem expedient, as continually subject to the power of taxation. That is, that it shall be and remain taxable, and that this forbids any action by the legislature which would place property beyond the power of taxation. On the other hand this section may well be construed as having no reference to the property of corporations to be created, and as leaving the power of the legislature in this regard as it stood before. This is the more natural construction when we take this section in connection with the clause before referred to, and find that no express restriction is placed upon the power conceded to have previously existed in the legislature in respect to corporations, in that clause which refers directly to the power to grant such charters. Again, the constitution of 1834 declared that a well regulated system of internal improvement should be encouraged, and for such purposes the legislatnre has often appropriated the revenues of the state, and further loaned the credit of the state to the extent of immense sums. The power to do this has never beeu questioned. If the legislature can thus appropriate and use the public money, it is difficult to see why it may not stipulate for the release of part of the public taxes for the same purpose, as it would be in effect the same. Upon this declaration of the constitution the legislature have from time to time freely acted. The state was without railroads. It was regarded as a public necessity that roads should be constructed. They were to be constructed by corporations; in a sense private corporations; and yet as it was believed that the resources of the state would be thereby developed and the public prosperity promoted, *they were regarded as public improvements*, and to be encouraged.—(Pacific R. R. vs. McGuire, 2 Wall., 36.) It was foreseen that as a private speculation such enterprises would not pay,

especially in those portions of the state where the cost of constructing the roads would be unusually heavy; perhaps in no instance has the individual who has invested his money in capital stock of a railroad in this state, as an original stockholder, ever been able to realize his investment, the stock selling generally at very low figures. All this was to some extent foreseen, and to meet this difficulty, *and induce* capitalists to risk their money in the enterprise, this proposition to exempt the property to be thus created was made in consideration of the benefits expected to result to the public from the public improvement. The property now sought to be taxed was not then in existence; it has been created in part at least by the money invested upon the faith of this stipulation—much of it for aught we know may have been brought from other states. The people of the state have certainly to some extent realized from the improvements the benefits anticipated, whether to the full extent or not is immaterial. It may or it may not have been a judicious contract upon the part of the state. The necessities for revenue now demand contribution from every available source. The property of some of these roads is valuable and exemptions are now odious. But if the law and the contract was valid at the time, we must in good faith abide by its terms, according to its fair and just import.

Upon this question it may be added, that where there has been no judicial construction of a clause of the constitution, the courts have given great weight to the construction given to the clause by other departments of the government.—(Stewart vs. Land, 1 Cranch, 299; Martin vs. Hunter, 1 Wheaton, 351; 6 Wheaton, 418; 12 Wheaton, 290.)

Several successive legislatures that met while this constitution was in force, a period of 36 years, granted charters of incorporation, with total or partial exemptions for a time, and during the entire period the power was never questioned. On the contrary, all departments of the government acquiesced and obeyed the laws thus passed, and under these nearly all of our public improvements have been constructed. This uniform action upon the part of the state authorities is entitled to great weight. Upon this question we conclude that the legislature had the power to stipulate for the exemption in question.

This brings us to the next question, which is, did this exemption pass to the new corporation by this sale? It is argued that at the time of this sale, which was after the new constitution went into effect, the legislature could not grant an exemption from taxation. It is, however, admitted that it might transfer from one to another the existing exemption, but it is denied that this was done. After the appointment of commissioners upon the part of the state to take the necessary steps against the delinquent railroads, it was found that in any attempt to sell the roads serious questions would arise as to the rights of the state and the defendants—whether the state had the right to sell out the entire property and franchises of the companies, or only the state's lien or interest thereon, and what

that interest was; whether the state could sell for the entire debt or only the unpaid interest on the bonds; how the rights of stockholders and others would be affected. To meet these difficulties an act was passed the 22d December, 1870, in pursuance of the right reserved in the general internal improvement act, which directed a bill to be filed in behalf of the state against the delinquent railroad companies, in the chancery court at Nashville, which by the act was vested "with exclusive jurisdiction to hear, adjudicate, and determine all questions of law and matters of controversy of whatever nature, whether of law or of fact, that have arisen or may arise touching the rights and interest of the state, and also of the stockholders, bondholders, creditors, and others in said road;" * * * "also to declare the exact amount of the indebtedness of each of said companies to the state, and likewise to define, as may be thought proper, what shall be the rights, duties, and liabilities of a purchaser of the state's interest in said roads, or either of them, and what shall be the reserved rights of said companies, stockholders, and others, respectively, as against said purchasers after said sale, under the existing laws of this state."

The bill was accordingly filed, and by a decree before the sale the amount of the state's debt was ascertained and adjudged, and also that the same was a lien upon the entire property, rights, privileges, and franchises of the companies; that a sale would transfer all the interest, leaving none in the stockholders or corporation; that a sale of any of the franchises of said company would vest the purchasers with all the rights, privileges, and *immunities* appertaining to the franchises by the charter and amendments. A sale was made, reported, and confirmed, and title vested as before stated. Without reciting the parts of the various decrees and proceedings bearing upon the question, it is sufficient to say that it is distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges, and immunities, as defined by the charter and laws and the decree in the cause, passed to and vested in the new company.

We are of opinion that the state, having expressly provided for the adjudication of all these questions by the tribunal appointed, and the purchase having been made upon the faith thereof, the validity of the adjudication cannot be now questioned by the state. But it is argued that under the decree vesting the new company with the rights and franchises of the old company, the exemption from taxation did not pass; that this decree could not have the effect of putting the new company exactly in the shoes of the old in all respects, so as to make the new company the same legal entity as the old. This result could only be effected by a purchase and transfer of all the stock of the old company, or by the sovereign power of the state through the legislature, where that is allowable, and as a consequence, although the property of the old company was transferred to the new, with the privileges and franchises necessary to the use and enjoyment thereof, yet the legal existence of the

old corporation was not thereby completely annihilated, but said corporation still existed, and to that existence the exemption in question still adheres as an incident, not having been in terms transferred by the legislature. We cannot clearly appreciate the idea of the right of exemption existing in the old company after all its property and franchises appertaining to the use thereof was gone from it and vested in the new. Even if the old corporation still existed in the abstract, it certainly no longer had a practical existence for the purposes of its creation, and certainly to say the exemption in question still existed in the old company when there was nothing upon which it could operate, would have no meaning.

It is manifest that when the purchasers came to contract for the entire road and franchises, it was important to know whether they were to have as purchasers the right to own and use the property, free from taxation, as specified in the old charter. This was an important element in fixing the price. The property with this exemption was worth more than it would have been without it. A sale of the property and franchises without the exemption would practically have taken from the old company all that was valuable to it; and yet the purchasers would not acquire what the old company owned. The old company had the property and franchises with the exemption, while the new one would acquire the property and franchises without the exemption. This would be selling the entire property and franchises of the old company for the payment of its debts, and yet destroying an important element of its value, refusing to give the old company the benefit of the exemption in the sale, and yet destroying its existence so far as of practical importance. By this means the exemption would be practically repealed, and the state would be allowed to resume the right of taxation over the property and franchises in question, which it could not have done had the old company continued to be the owner.

This argument is used to show that the parties must have understood from the adjudications to which we have referred, that they were purchasing with the exemption and with every element of value which attached to the property and franchises in the hands of the old company, and such, we think, is the fair and legitimate construction of the proceedings referred to. The case of Trank vs. McGuire et als., from the Supreme Court of the United States, is wholly different. There the railroad, &c., was purchased by the State of Missouri, and, of course, the exemption was merged, as the exemption from the right of the state to tax would mean nothing when the state itself became the owner of the property. And so the state having become the absolute owner, when it came to sell the said road again, could sell with or without the right of exemption without injustice to any one, but as the new constitution of Missouri before the resale by the state had forbidden the grant of such exemption, it was held that the legislature could not authorize a sale with the exemption. But here the state never became the owner of the road, and the principal of the case does not apply.

This opinion was prepared more than a year ago, and since then we have seen the recent case decided by the Supreme Court of the United States, Morgan vs. Louisiana, 3 Otto, 217. There are probably some points of difference between that case and this; the exemption then was of the capital stock, works, works-shops, warehouses, vehicles of transportation and other appurtenances of the company. It is certainly clear, as said in that case, that a purchaser of an engine or car from the company would not hold such property exempt from taxation, or that the purchaser of a house would not hold it exempt from execution, because it had been exempt in the hands of the persons from whom it was purchased; but here the entire road, as a whole, was held free from taxation; it was purchased with all its appurtenances as a whole, with the franchises of the old company; that is, the right to use the property as the old company had the right to use it; and if the purchaser acquires all that was valuable, the exemption must attach to the property, especially as the decree settles that all rights and immunities passed and nothing remained in the old company. With great respect for the high tribunal making the decision, we are not convinced by it that the exemption in such a case is a mere personal privilege that cannot pass to a purchaser of the entire road with franchises without a new legislative grant; the exemption being part of the charter, cannot be repealed by the legislature. It is a right for which a consideration has been given, but the decrees of the court in this case are in pursuance of the act of the legislature, and are equivalent to a legislative grant. Though the state has obtained the benefit of a sale purporting to be with the exemption, we think the case of Tomlinson vs. Branch, 15 Wall., 460, sustains our conclusions. —(See, also, Phila., Will'n and Baltimore R. R., 10 Howard, 376.)

It will be observed that the question whether an exemption is granted in the charter in the first instance, or what language is necessary to grant an exemption, as presented at the present term, in the case of the E. T. V. & G. R. R. Co. vs. Hamblin County, is different question from the one we are now considering as to the transfer of such exemption upon a sale of an entire road and franchises to a purchaser the latter question is not governed by the same reasons or rules of construction, but the decrees in this case pass to the purchaser the entire franchise, with the rights and immunities appertaining thereto. We hold upon both questions for the plaintiff and decree that the judgment be reversed, and judgment entered for the plaintiff.

McFARLAND, *J.*

We place our concurrence as to first question upon the ground that this being a public improvement the legislature might grant it aid and appropriate money for its use, and releasing taxes in its favor is the same in effect, but we reserve the question as to the power of the legislature to make such exemptions in favor of private corporations not chartered for the purpose of constructing public improvements.

FREEMAN.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

WM. M. FARRINGTON *vs.* THE STATE OF TENNESSEE.	No. 646.
S. H. DUNSCOMB *vs.* THE STATE OF TENNESSEE.	No. 647.
M. J. WICKS *vs.* THE STATE OF TENNESSEE.	No. 648.
J. C. NEALY *vs.* THE STATE OF TENNESSEE.	No. 649.
NAP. HILL *vs.* THE STATE OF TENNESSEE.	No. 661.

ARGUMENT OF J. B. HEISKELL, ATT. GEN'L.

In these cases the question to be settled is, whether the stockholders of the several corporations are exempt under clauses granting exemption to the corporations—each of the clauses providing for a tax of ½ of one per cent. on each share of the capital stock subscribed (or paid), which *shall be in lieu of all other taxes.*

Is this in lieu of all other taxes on the corporation, or is it in lieu of all other taxes upon some one other than the corporation?

State of the Law in Tennessee when the Charters were Granted.

It may be well to premise that in the State of Tennessee, at the time this exemption was granted, the right to tax privileges as a distinct thing from property was well established, and that the courts of Tennessee had clearly recognized then, as they have ever since held, that property could be taxed as such and still afford the measure for a tax on a privilege.

In Tennessee it has been long settled that a tax upon the privilege of a merchant is a different thing from a tax on his property, although it may be ascertained by a percentage on his capital or sales, and that it may include in the estimate property exempt from any property-tax. (Mayes *v.* Erwin, 8 Hum., 293; State *v.* Crawford, 2 Head., 462.) Therefore that one payment does not exempt the same goods from being estimated again in the hands of another merchant. (8 Hum., 293.) And a merchant must pay additional tax as a peddler. (2 Swan, 357.)

It was also held in Jenkins *v.* Ewin, 8 Heis., 480, that a tax upon the property of a merchant *ad valorem* as all other citizens were taxed, did not preclude the legislature from taxing him as merchant, under a clause putting merchants and privileges in the same class and providing that they might be taxed at the discretion of the legislature.

The distinction between a tax annexed *to a franchise as a royalty*, and a tax *upon the property constituting the capital*, is recognized clearly in the opinion in Bank of Commerce *v.* New York City, 2 Bl., 629.

In Society for Savings *v.* Coite, 6 Wall., 606, '7, 608, the court say: "Reference is evidently made to the total amounts of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendant. They enjoy *important privileges* and it is just they should contribute to the public burthens.

In the Provident Institution *v.* Massachusetts, Ib., 630.

The * * * taxation is only a burden annexed to the rights and privileges granted to the corporation * * * The tax on the shares was not a tax on the capital of the bank. (Citing Queen *v.* Arnaud, 9 Adol. & El. New S., 806. See also, Hamilton Company *v* Mass., Id., 637, 638.

In these three cases there were dissents, but they were upon the ground that the tax was in fact on the property, not on the franchise, and so recognized the distinction fully.

But in addition to these points so settled in Tennessee, we had the case of the Union Bank against the State which decided that the property of a stockholder was a property distinct from that of the corporation, and was not protected by an exemption implied in favor of the corporation. On these points, that the right to tax the stockholder did not depend upon the right to tax the corporation, and that the properties were distinct, there has never been any contradictory decision.

On the latter point, the decision in Brightwell *v.* Mallory, 10 Yer., 195, 198, is a strongly concurring authority.

But the case of the Union Bank *v.* The State, also decided that an exemption of the bank, implied from reserving a bonus or tax, was also an exemption from tax on the capital of the bank; and they ignored the very idea established since, that the State might tax a privilege and at the same time tax the property that was necessary to the use of the privilege. (See cases *supra*, and especially Jenkins *v.* Ewin, 8 Heis., 480.)

Another fact is to be considered here. The constitution of 1834—in force when these charters were granted—contained this clause: Art. 2, sec. 28. "*All lands* liable to taxation * * * town-lots, *bank-stock*, slaves between the ages of twelve and fifty years, and such other property as the Legislature may from time to time deem expedient, shall be taxable. All property shall be taxed according to its value," &c.

The charters in No. 646 and 648, are charters of the Union and Planters Bank, and of the Savings Bank of Memphis.

If my construction of the constitution is right, the Legis-

lature had no power to exempt *bank-stock* from taxation, and the charters of the banks containing such exemption cannot be construed to exempt stock-holders or *bank-stock*, because it would violate the constitution, and so must needs be construed to apply to the corporate privileges and property, and not to stock. If that be established as the proper construction of the words in these bank charters, a like construction must follow as to contemporary charters of insurance companies.

The first of the charters granted, that of the Savings Bank of Memphis, as the record shows, No. 648, p. 2, was passed in 1856, and so may be regarded as the model on the others are formed.

We are now ready to take up the construction of the charters.

Appeal Tax Court Case.

The great case for the appellants is that of Gordon *v.* The Appeal Tax Court, 3 Howard, which is construed by them with the Union Bank case to establish these propositions:

1st. That an exemption is implied by a reservation of a bonus or specific tax.

2d. That an express exemption superadded to an implied one, means something different from what it would mean if it stood without any implied exemption under it. The idea of the gentlemen seems to be based on the principle admitted in physics, that two objects cannot occupy the same space. But this doctrine of impenetrability, has never, so far as I know, been successfully applied in law.

Now the object of construction is to arrive at actual intention. Does the fact that a matter is explicitly stated in a writing, when it would be implied if not stated, require that we should go outside of what would be implied to give scope to the express matter? In many cases it is a very proper precaution to state expressly what some men might know would be implied in law. A warranty of title to

personalty is implied in law. Now, will an express warranty set the courts upon the *qui vive* to see what is by construction to be added, because it is to be taken for granted that a needless provision would not be inserted without intending something more by it than would be implied without it? If we find a sufficient reason for inserting it in the fact that certainty is attained by it, that is enough. You allow *ut res magis valeat quam pereat* where you give force to what is written without saying that, because something written would be implied without writing, *ergo*, we find a new meaning different from what we would in the absence of the implication.

But it is said, in answer to this view, that the Union Bank case fixes that the exemption is implied to a certain extent, and that there is nothing then for the words "in lieu of all other taxes" to operate upon unless it is the tax on stockholders. It is often a very sufficient reason with a careful draftsman to insert words that they render that clear which would otherwise be doubtful. It could not be certainly foreseen in 1857 that Judge Nicholson in 1872 would hold that no town corporation could tax a privilege which the State was not taxing, and the making of this matter certain was a good reason for inserting the words.

But we have shown the other uncertainties which surrounded this case. Although the Union Bank case held that the capital was exempt from the fact that the privilege was taxed, as we have shown, the Erwin case held that a tax upon a privilege did not exempt from tax upon the property, and there was ample room for doubts whether the point so clearly presented by Mr. Yerger in the Union Bank case—that the capital stock would not be exempt, because the privilege was taxed—might not yet prevail. I insist then that there was sufficient reason for the insertion of such clauses in 1856, 1857 and 1858, without being driven to say we can only account for this provision in these charters upon the hypothesis that they must mean something more than what would be implied without them. If they remove doubts and render certain what otherwise

would be uncertain, they have a sufficient motive. My associate suggests, too, that the Union Bank case held that a banking house would not be exempt, and careful men might seek to cover in their place of business, and like property.

But Messrs. Estis, Jackson, and Ellett's brief suggests that the provision was inserted to meet the Union Bank case, by words borrowed from the Gordon Tax Appeal Court case. Now, if this were so, it is, *prima facie*, a fraud upon the Legislature. The Union Bank case treated of the case of the stockholder, and held him liable when the bank and its capital was exempt. If the draftsman of the bills meant to face that question, he had nothing to do but to name the *bank and its stockholders*. If he had the Union Bank case in mind, he could not have ignored the importance of that question, and of making it clear, and if with that point before him he adopted words that were not clearly directed to that point with a view to reach it without exciting the vigilance of the Legislature, that would be a case of actual fraud on the Legislature. But the possibility of such a fraud is one ground on which the courts have held that the policy shall be to require expression clear beyond any doubt. Chief Justice Taney says, "the rule that privileges, granted a corporation, are to be strictly construed against a corporation is founded on principles of justice, and necessary for the well being of every State. For it is matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and land companies, railroad companies, or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the Legislature in the last days of its session, when from the nature of our political institutions, the business is unavoidably transacted in a hurried manner," &c. Debolt's case, 16 How., 435.

With the point settled that upon a total exemption of the corporation and company, the stockholder was not exempt, but liable, an express exemption of the corporation, in-

serted with a view to exempt the stockholder, is an insidious mode of doing what ought to be done *clearly* and in *uberrima fides*. *Per contra*, such an insertion made without such an intention can have no weight in construing the law. The ruling of this court will not allow it to presume anything against the State on a question of this kind. The court will presume that a bank promoter or insurance lawyer, drawing a charter would know of the decision in the 9th Yerger case. They will not presume that a Legislature was informed of or acted upon a knowledge of the Gordon Tax Appeal Court case. Certainly not when good faith and fair dealing of the draftsman required him to state explicitly what he meant, and the Legislature in good faith and fair dealing was bound not to cover up in equivocal terms from the people, important grants of right.

But if it is claimed that the Gordon tax Appeal Court case is to cover this case, then, at least, the language of that case ought to have been followed. The court in that case places much stress upon the pledge of the faith of the State, and says "the faith of States is never pledged but for some substantial end." Nothing of this solemn character (equivalent to the oath of an individual) occurs in the Tennessee charters, and there is, therefore, nothing to show that the attention of the Legislature was in any wise called to the Gordon case. If the very words of that act had been copied, it might be regarded as evidence, at least, that the draftsman had that case before him. But it takes that to raise even such a presumption.

The act, reviewed in that case, too, uses the word *burden*—"no other tax or burden." Now, a tax upon the stockholders, while it is not a tax upon the bank, may still be, in some sense, a *burden* upon the bank. But the Tennessee charters do not relieve the corporations from anything but *other taxes*, and as we do not propose any other tax upon them, we do not violate that provision.

In Gordon's case the court holds that the mere tax on the franchise would not protect the bank from a tax upon the capital of the bank. "*The franchise is their corporate*

*property, which like any other property would be taxable if a price had not been paid for it. * * * The capital stock is another property, corporately associated for the purpose of banking,"* and so, clearly capable of being taxed, in Justice Wayne's view, as the property of the bank. It is here that a material error creeps in. *The capital stock* is another property *corporately associated for the purposes of banking, but in its parts is the individual property of the stockholders, in the proportion they may own them,* (p. 150.)

The opinion on page 146 is more explicit: "*But whether the bonus * * * is paid by an annual tax on the capital stock, or in any other way, it is in the discretion of the Legislature to tax the capital stock as an aggregate, * * * or the stockholders, on account of their separate ownership of it, or the dividends in the aggregate, or the stockholders, on account of their portions of them.*"

The idea is clearly given here that the capital is taxable as the property of the corporation, that is, as an aggregation. But mingled with this is the idea that the accumulated capital of the corporation, its property, is identical with the shares of the shareholders, the absolute property of the individuals. It is just here that the case fails upon one vital point. Its fundamental idea is the identity of the two properties—the accumulated capital and the stockholders' stock. If these are established by subsequent cases to be separate and distinct properties, then the whole basis of the Gordon case fails. The protection of the capital from taxation in the hands of the bank as the property of the bank affords scope for the exemption, and the extension of it to the property of individuals, is prohibited by the principles laid down in numerous cases. Is this, then, one property or two.

Capital and Stock Different Properties.

In McCulloch *v.* The State of Maryland, 4 Wheat., 316, it was held that the Bank of the United States and its branches were instruments employed by the national Government in the execution of its powers, and no more liable to taxation

than the mail, the mint, the custom-house papers, or judicial processes of the United States. But, said Chief Justice Marshall, p. 436, "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, *nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution*, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the Government of the Union to carry its powers into execution."

And see Thomson *v.* Pacific Railroad, 9 Wall., 579, 589.

The distinctions were taken by Judge Turley in the Union Bank *v.* The State, 9 Yerger, 490, 498, where he says:

"The Constitution, (of 1834,) in enumerating the different kinds of property which shall be made liable to taxation, mentions bank stock, but not the capital stock of the bank. It can scarcely be necessary to say that by bank stock is meant individual interest in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the bank on hand at the expiration of the charter, and that the capital stock of the bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used and managed in trust for the benefit of the members.

"We are satisfied that a tax upon the bank was not intended, but that an individual tax on the owners of the stock of the bank was."

This case is construed in the case of the City of Memphis *v.* Ensly, pp. 36, 37, 38, pamphlet, which is an authority to the same point.

In Brightwell *v.* Mallory, 10 Yerg., 195, 198, it is said:

"It is a mistake to suppose that the stock of an individual consists of so much *money* owned by him in the bank. The money in the bank is the property of the institution, and to the ownership of which the stockholder has no more claim than a person has who is not at all connected with the bank.

The stockholder has an entire and perfect ownership over his own *stock*, and may sell and transfer it to whomsoever he pleases; and the bank has no power to restrain him from doing so. The evidence of the ownership is the certificate of the bank that he is entitled to so many shares of the capital stock of the bank; and it is also the evidence of his title to his proportion of the profits or dividends which may be declared from time to time, and, when the institution closes its business, to his proportion of the capital stock and profits which may remain to be divided.

"The stock of the individual being thus his property, and subject to his control and disposition, is made liable to the payment of his debts by bill in equity, by the act of 1832, chap. 11, secs. 1 and 2."

In the case of the Louisville and Nashville R. R. Co. *v.* The State, 8 Heis., 795, the Court of Tennessee decides that there are four taxable elements "in all joint stock companies:" "Capital stock, corporate property, the franchise of the corporation, and the individual stock of the stockholder. Whether either of these may be exempted under our Constitution, may be matter of grave doubt."

In Van Allen *v.* The Assessors, 3 Wall., 572, 583–584, this court said, Mr. J. Nelson delivering the opinion:

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations."

And as a striking exemplification, the case of The Queen *v.* Arnoud, 9 Adolph. & Ellis, (N. S.,) p. 806, is cited.

The court proceeds:

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by

the shareholder, like any other property that may belong to him.

"Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it."

In Bradley *v.* The People, 4 Wall., 459, 462, Nelson, J., the question was distinctly presented, whether a tax on *the capital stock* of a bank is the same thing as a tax upon *the shares* of which the capital is composed? And the court held it *was not*. And adhering to the doctrine that the capital stock of a bank, when invested in securities of the United States, which were exempt from taxation, were also exempt, it held that the shares of stock in the bank were taxable as the individual property of the several stockholders.

In Austin *v.* The Aldermen, 7 Wall., 694, 699, Mr. J. Swayne merely referred to the former decisions as settling the questions.

In the National Bank *v.* The Commonwealth, 9 Wall., 353, 358–359, Mr. J. Miller states with precision and clearness the result of the former decisions of the Supreme Court of the United States. He says:

"It has been established, as the law governing this court, that the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. * * * In whatever this capital may be invested, it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the Government, it could not be taxed, nor could the corporation be taxed as the owner of such securities.

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the States on stock or shares so held by them, although all the capital of the bank be invested in federal securities, provided the taxation does not violate the rule prescribed by the act of 1864."

In the Delaware Railroad Tax Case, 18 Wall., 229, the court, Field, J., delivering the opinion, says:

"The share of a stockholder is, in one aspect, something different from the capital stock of the company. The latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional interest of the dividends when declared, and to a proportional part of the effects of the corporation, when dissolved, after the payment of its debts." Citing Nat. Bank *v.* Coml., 9 Wall., 353.

The same distinctions were taken in reference to the taxation of the capital stock and franchises of the Bank of the United States, and of the shares of its stockholders.

In Bulow *v.* City of Charleston, 1 Nott & McCord, 527, the court say:

"It will be necessary to examine into the nature of the property which the stockholder has in the stock. Though bound together by a union of funds and a community of interests, the stock of each member, of whom the United States constitutes one only, the property which each possesses in the bank is wholly distinct and independent of the others, and is in no manner dependent on or connected with them, further than the losses or profits of the one is measured by those of the others, in consequence of the community of their interest. It does not, therefore, follow that if the interest of the United States in the bank, or the bank itself, in respect thereof, is exempted from taxation, that the interest of an individual, in no wise connected with or under its control, shall also be exempted." (Pp., 529–530.)

The result of the several decisions is, that although the franchise of a corporation may be exempt, and although its capital stock may likewise be exempt, yet the Legislature may impose a tax on the shares as the individual property of the shareholders.

These distinctions are stated by Denio, Chief Justice, in City of Utica *v.* Churchill, 33 New York R., 161, 237–240, which is the same case reported as Van Allen *v.* The Assessors, 3 Wall., 573.

They are recognized in the Mayor of Nashville *v.* Thomas, 5 Cold., 600, 603, 606.

In Lillard *v.* Porter, 2 Head's R., p. 177, it was held that the stockholders and the corporations were so entirely distinct, that where a creditor of the corporation filed a bill, making all the stockholders defendants, but omitting the corporation itself, and sued out an attachment, and had it levied on the property of the corporation, he thereby acquired no lien, as the officer had no right to make the levy.*

No Exemption Implied.

The Gordon Case depends too for its support upon the idea that an exemption is implied from the stipulation to pay a bonus. If this is erroneous and no such exemption is implied, then the express exemption is necessary to prevent a higher tax than that agreed upon.

Now, this question came before this court in the Delaware Railroad Tax Case, 18 Wall. There the law required "the new company to pay annually into the treasury of the State a tax of one quarter of one per cent. upon its capital stock of $400.000." "*That provision is not accompanied with any words indicating the intent of the Legislature that a further or different tax should not be subsequently levied. Had the provision in question been embodied in an independent act, no one would pretend that the designation of the amount and character of the tax carried with it any implication that the tax should remain unchanged in these particulars for all future time during the continuance of the corporation. And it is not perceived how a different conclusion is warranted, because the tax is designated in an independent section of the act under which the new company was formed, instead of being designated in an independent act. As already observed nothing can be taken from the power of the State in this respect, by presumption or inference.*" (P. 226.)

See also Erie R. R. Co. *v.* Penn., 21 Wall., 499. Citing and approving the Easton Bank *v.* Commonwealth, 10

* The extracts and citations on this point are largely borrowed from the argument, in the State court, of Wm. Randolph, Esq., former attorney for the city of Memphis.

Penn. St., and the Erie R. R. *v.* Commonwealth, 66 Penn. St., 84.

The same cases are also cited and approved in 18 Wall., 227, and the language of the former case quoted and adopted.

The case in 18 Wall., 206, and the Easton bank case, are again cited and approved in 92 U. S., 674, in the case of the Central R. R. Co., Georgia. Which also cites Bailey *v.* Maguire, 22 Wal., 215; see p. 227. (Mr. J. Davis.)

The argument in the 92 U. S. case, is, "The M. & W. never had any contract * * limiting its liability to taxation. Its original charter said nothing upon the subject, and the amending act of February 9, 1869 gave it no exemption. It simply provided that the Company should thereafter pay the same amount annual tax to the State as the other railroad corporations then did, to wit: one-half of one per cent. on the amount of net income. It contained no negative words. It did not declare that higher taxation should not be imposed at any future time. At most, it raised only an implication. But it is settled that a claim to exemption cannot be supported unless the statute is so plain as to leave no room for controversy."

North Wis. R. R. *v.* Maguire, 20 How., 61, tends strongly in the same direction. (Mr. J. Clifford.)

This is discussed by this court in Ohio L. J. & T. Co. *v.* Debolt, 16 How., 435. He says that corporations must "see that the right or exemption they claim is granted in clear and unambiguous language." * * * If they come here (to the S. C. U. S.) to claim an exemption from their equal share of the public burthens, or any particular exemption or privilege, they must show their title to it, and that title must be shown by plain and unequivocal language. (Id., 436.)

The presumption against parting with the power to tax is ably discussed in the opinion of Mr. Justice Campbell, in the Piqua Bank case, 16 How., 409, citing 4 Pet., 514; Charles Riv. Br. case, 11 Pet., 420; 7 Harris, 144; 11 Barr. 142; Shorter *v.* Smith, 9 Ga. R., 10 N. H., 138; 17

Conn., 454; 21 Verm., 590; 21 Ohio, 564; 9 Ala., 235; 9 Rob., 324; 4 Coms., 419, and 6 Gill, 288. The opinion then proceeds to quote from the Charles River Bridge case, and this extract will be profitable to read.

In the opinion of the court, 16 How., 387, in a quotation from 4 Pet., 561, it is said, "it would seem that the relinquishment of such a power is never to be presumed."

See also Binghampton Bridge case, 3 Wal., 75, per Davis, J.; Society for Savings *v.* Coite, 6 Wal., 606; N. Miss. R. R. *v.* Maguire, 20 Wal., 60; Pacific R. R. *v.* Maguire, 20 Wal. 40.

The relinquishment of the power to tax is not to be presumed, but must be proved by an unmistakable grant. The case of the Providence Bank *v.* Billings, 4 Peters, 561, settles this by direct decision. It cites Stourbridge Canal *v.* Wheely, 4 Barnw., and Adol., 793, and is cited and approved in Piqua Bank *v.* Knoop, 16 How., 387–8, 391. It is also affirmed in the Charles River Bridge case; also in Tucker *v.* Ferguson, 22 Wal., 575, cited and quoted in West. Wis. R. R. Co. *v.* Supervisors, 93 U. S., 595; Delaware Tax Case, 18 Wall., 229; Gossett *v.* Love, 8 Heis. 549.

Again, the reasoning in the Gordon case, as to banks, having two senses, which may include stockholders or may only include the officers, seems to me to be untenable. Of course some acts are done by a corporation in one way, some in another; but to insist that it follows that because a proposition in regard to a "bank" must be ratified by the stockholders, therefore it uses the word "bank" in the sense of "stockholders;" when, if the ratification would be sufficient by the officers, the word "bank" would mean the entity, and not the stockholders, is something that my mind does not take down.

If it is a corporate act to ratify an amendment to a charter, then it is so, whether it be done by the stockholders directly or by the directory or other agency; and the essence of the act is the same, whatever the mode may be.

To conclude this argument on the Gordon case. The cases in this court attack that case and undermine it in

every direction. Its basis is upon the idea of favorable constructions to the grant and favorable deductions from such favorable implications—implied exceptions and implications that express grants are to be construed as superadded to those implied, instead of being to make them clear. The decisions which forbid the one, on like principles forbid the other.

What is the true principle on which a corporation stipulates for a loan or tax? In general a State can tax only by general laws and uniformly. The corporation with this in view, proposes that the Legislature may tax them at a higher rate as the price of their privilege—or that they will pay at that rate. They are then, by their own consent, onerated with a tax that would not be allowable without the element of consent. But, whenever the general tax reaches the same level, and a higher tax becomes allowable as the equal and legitimate tax on all in like condition, they fall under the general rule, unless they have protected themselves by contract, and for this purpose the clause, *in lieu of all other taxes*, comes into play, and has its full force. When, therefore, it would fall out that the Legislature might legitimately enforce a higher tax, this clause comes in to prevent it. In other words, instead of the bonus, or higher tax being inserted for the benefit of the bank, it is for the benefit of the States, and does not imply anything.

CONSTITUTION OF 1834 REQUIRES BANK STOCK TO BE TAXED.

The Union Bank Case, 9 Yerg., 498, is important in its bearing on the Constitution of 1834. In discussing the distinction between capital stock and shares in a bank, the court cite the 28th section of article 2, which, "*in enumerating the different kinds of property which* SHALL *be made liable to taxation, mentions bank stock, but not the capital stock of the bank.*" The court then draws the distinction, and concludes: "*This clause of our Constitution does not direct that the* CAPITAL STOCK *of any corporation shall be taxed, but has left it to the discretion of the Legislature,*" implying

that it is otherwise as to *bank stock*, which *shall be made subject to taxation*.

Now, is not this the proper construction of that Constitution? How can effect be given to the words: "all lands, town-lots, *bank-stock*," * * * "and such other property as the Legislature shall, from time to time, deem expedient shall be taxable."

Why enumerate lands, town-lots, and bank-stock, if the Constitution only meant that such property in general should be taxed, as the Legislature should deem expedient? Does not the enumeration of some kinds, and the discretion as to all other, mean that a different rule was to prevail as to one class from that as to the other? Is the optional to be no more in the discretion of the Legislature than the peremptory? Assuredly this does leave no room for any construction, but that contemporaneous with the Constitution, in the Union Bank Case.

But there is another view more conclusive than this, if possible. The word "*taxable*" is like most words in our tongue—somewhat vague in the idea it conveys. Most naturally, I admit, it conveys a permissive, and not a mandatory, meaning. But why say to the Legislature, whose powers are full, except where restrained, you *may*. You may tax what without such permission is taxable. But the word may have the meaning of "taxed," and here the context demands that it have that meaning. Look at the clause. All lands subject to taxation, *i. e.*, all *taxable* lands, *shall* be *taxable*. To read the word "taxable," as meaning, "may be taxed," renders at least that one expression of the same sentence absurd. It would put the convention in the attitude of saying "lands subject to taxation" shall be subject to taxation.

All *town-lots* shall be taxable, all *bank-stock* shall be taxable, and all such other property as the Legislature shall from time to time, deem expedient *shall be taxable*. Now, in what way did they mean for the Legislature to exercise the power to decree the taxability of that other property. Did they expect one Legislature, by declaratory law, to fix a taxable quality to property *in futuro*, or did they mean that they should *tax* such property as they might deem

expedient *in presenti?* Of course, they mean that such other property as the Legislature shall deem expedient *shall be taxed.*

If they meant, then, that this discretionary property should *be taxed* when they said *taxable*, did they not mean the same as to the other classes as to which they use the word? In other words, did they use the word in a double sense, to express a quality as to four things—lands, lots, stocks, and slaves, and a different thing as to the property the Legislature should actually tax? They certainly meant that what the Legislature said tax of the other property should be *taxed ipso facto* not merely become taxable *in futuro*. They, by the same word, meant that the other four things should be *taxed*. The word occurs but once, and, to meet the view of the appellants, must in the one use have two meanings.

But this is further strengthened by the use of the very word as a paraphrase in the convention. On page 169 of the Journal of the Convention is the clause as reported, showing the word *taxable*. On page 268, Mr. John A. McKinney moved to fix the ages of the slaves which should be *taxable*, in these words: "*That slaves between the ages of twelve and fifty years should be taxed;*" and it was so voted, but the word "*taxable*" remains in the text. Can anything be clearer than that the Constitution uses the word in the sense of taxed?

In the brief of counsel, in No. 661, we have an enumeration of charters passed by the State of Tennessee, supposed to establish a uniform legislative practice in regard to exemptions, under the Constitution of 1834, inconsistent with the construction we claim to give that instrument. It will be observed, however, that in the enumeration of such charters, from 1835 up to 1856, there is only one bank which is so exempted. That is the Southwestern Railroad Bank, in 1837. That did contain such an exemption, but it did not have it covered up in words like those claimed here, to exempt stockholders. No; it exempted them in the very words—*stockholders;* and so was an open and clear expression of intention. This, I say, is a single instance in twenty years. But even this is not unaffected by grave considera-

tions to weaken its force. The privileges there granted are mixed up with those of a railroad charter. No person could own stock in the bank without a corresponding share in the railroad; and it was as a means of building the railroad that the bank was chartered. The Constitution contained a declaration in favor of internal improvements, and the State has granted them rights of eminent domain and spent millions upon millions in aiding them. In the recent case which the appellants produce, of the Knoxville and Kentucky Railroad *v.* Hicks, Knoxville, 1877, the case is put upon the ground, in part, that an exemption was allowable, because an appropriation would be; and Judge Freeman concurs in the opinion on that ground alone.

I wish to say here of that case, that it is not inconsistent with my view of the Constitution of 1834. It is treating of railroad exemptions, not of *bank* stock. It puts railroads on somewhat exceptional ground. The property of such corporations is peculiar, and properly comes under the "other property" which the Legislature may tax or not, as they shall from time to time deem expedient. A railroad is neither land, lots, bank stock, nor slaves; but a property essentially different from either.

Lionberger *v.* Rouse is another case greatly relied upon by the counsel for the appellant.

The report of that case (9 Wall., 471) shows that it was asserted by the plaintiff that the State had disabled itself by its contract to tax the stockholders. Messrs. Evarts and Brodhead assume this as matter of law.

Messrs. Blair and Dick (p. 472) do not controvert this proposition. So it passes to the court an uncontested point. Of course, the court would not examine such a proposition, narrowly and critically, as it would do a point in controversy. Such has probably been the holding of the Missouri courts on the construction of such charters. Whether so or not, the point being assumed on both sides and the case put on grounds wholly different, the court would be justified in taking the point for granted, and without the citation of an authority, it does so. This is not a dictum, but it is not a re-examination of the question. Certainly it is not an examination of it, with the element